89-1806

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES ARMY, ET AL., PETITIONERS

v.

SERGEANT PERRY J. WATKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-4006
D.C. No. C81-1065R

SERGEANT PERRY WATKINS, PLAINTIFF-APPELLANT

VS.

UNITED STATES ARMY, ET AL., DEFENDANTS-APPELLEES

[Filed May 3, 1989]

APPEAL FROM THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Before: Goodwin, Schroeder, Pregerson, Alarcon, Nelson, Canby, Norris, Beezer, Hall, O'Scannlain, and Trott, Circuit Judges.

HARRY PREGERSON, Circuit Judge:

The United States Army denied Sgt. Perry J. Watkins reenlistment solely because he is a homosexual. The Army refused to reenlist Watkins, a 14-year veteran, even though he had been completely candid about his homosexuality from the start of his Army career, even though he is in all respects an outstanding soldier, and even though the Army, with full knowledge of his homosexuality, had repeatedly permitted him to reenlist in the past. The Army did so despite its longstanding policy that homosexuality was a nonwaivable disqualification for reenlistment. The issue before the en banc court is whether the Army may deny reenlistment to Watkins solely because of his acknowledged homosexuality.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

In August 1967, at the age of 19, Perry Watkins was drafted into the United States Army. In filling out the Army's preinduction medical form, he marked "yes" in response to the question asking whether he had homosexual tendencies. The Army nonetheless found Watkins "qualified for admission" and inducted him into its ranks.

During Watkins' initial three-year tour of military duty, he served in the United States and Korea as a chaplain's assistant, personnel specialist, and company clerk. A year after his induction, in 1968, Watkins signed an affidavit stating that he had been a homosexual from the age of 13

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[1] These facts are taken largely from this court's opinion in Watkins v. United States Army, 847 F.2d 1329, 1330-34 (9th Cir. 1988), as well as from other prior opinions in this case. See 721 F.2d 687 (9th Cir. 1983); 551 F. Supp. 212 (W.D. Wash. 1982); 541 F. Supp. 249 (W.D. Wash. 1982).

and that, since his enlistment, he had engaged in sodomy with two other servicemen, a crime under military law. The Army, which received this affidavit as part of a criminal investigation into Watkins' sexual conduct, dropped the investigation because of insufficient evidence.

When his first enlistment period expired in 1970, Watkins received an honorable discharge, but his reenlistment eligibility code was listed as "unknown." In 1971, Watkins requested correction of the reenlistment designation and the Army corrected the code to category 1, "eligible for reentry on active duty." Shortly thereafter, he reenlisted for a second three-year term. In 1972, Watkins was denied a security clearance because of his homosexuality, and the Army again investigated him for allegedly committing sodomy and again terminated the investigation for insufficient evidence. Following another honorable discharge in 1974, the Army accepted Watkins' application for a six-year reenlistment.

In 1975, the Army convened a board of officers to determine whether Watkins should be discharged because of his homosexual tendencies. On this occasion his commanding officer, Captain Bast, testified that Watkins was "the best clerk I have known," that he did "a fantastic job—excellent," and that Watkins' homosexuality did not affect the company. A sergeant testified that Watkins' homosexuality was well-known but caused no problems and generated no complaints from other soldiers. The four officers on the board unanimously found that "Watkins is suitable for retention in the military service" and stated, "In view of the findings, the Board recommends that SP5 Perry J. Watkins be retained in the military service because there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance.

SP5 Watkins is suited for duty in administrative positions and progression through Specialist rating." The board's recommendation became the final decision of the Secretary of the Army.

In November 1977, the United States Army Artillery Group (the USAAG) granted Watkins a security clearance for information classified as "Secret." His application for a position in the Nuclear Surety Personnel Reliability Program (the PRP), however, was initially rejected because his records—specifically, his own admissions—showed that he had homosexual tendencies. After this initial rejection, Watkins' commanding officer in the USAAG, Captain Pastain, requested that Watkins be requalified for the position. Captain Pastain stated, "From daily personal contacts I can attest to the outstanding professional attitude, integrity, and suitability for assignment within the PRP, of SP5 Watkins. In the 6 months he has been assigned to this unit SP5 Watkins has had no problems what-so-ever in dealing with other assigned members. He has, in fact, become one of our most respected and trusted soldiers, both by his superiors and his subordinates." An examining Army physician concluded that Watkins' homosexuality appeared to cause no problem in his work, and the decision to deny Watkins a position in the Nuclear Surety Personnel Reliability Program was reversed.

Watkins worked under a security clearance without incident until he again stated, in an interview on March 15, 1979, that he was homosexual. This prompted yet another Army investigation which, in July 1980, culminated in the revocation of Watkins' security clearance. As the notification of revocation makes clear, the Army based this revocation on Watkins' 1979 admission of homosexuality, on medical records containing Watkins' 1968 affidavit stating that he had engaged in homosexual conduct, and on his history of performing (with the permission of his com-

manding officer) as a female impersonator in various revues. The Army did not rely on any evidence of homosexual conduct other than Watkins' 1968 affidavit. In October 1979, the Army accepted Watkins' application for another three-year reenlistment.

In 1981 the Army promulgated Army Regulation (AR) 635-200, chpt. 15, which mandated the discharge of all homosexuals regardless of merit. Pursuant to this new discharge regulation, another Army board convened to consider discharging Watkins. Although this board explicitly rejected the evidence before it that Watkins had engaged in homosexual conduct after 1968, the board recommended that Watkins be separated from the service "because he has stated that he is a homosexual." Major General Elton, the discharge authority overseeing the board, approved this finding and recommendation and directed that Watkins be discharged.[2]

In May 1982, after the Army board voted in favor of Watkins' discharge, but before the discharge actually issued, District Judge Rothstein enjoined the Army from discharging Watkins on the basis of his statements admitting his homosexuality. 541 F. Supp. at 259.[3] The district court reasoned that the discharge proceedings were barred by the Army's regulation against double jeopardy, AR 635-200,

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[2] Major General Elton, on his own initiative, made an additional finding that Watkins had engaged in homosexual acts with other soldiers. The district court ruled both that Major General Elton lacked the regulatory authority to make supplemental findings, Watkins v. United States Army, 541 F. Supp. 249, 259 (W.D. Wash. 1982), and that the evidence presented at the discharge hearing could not support a specific finding that Watkins had engaged in any homosexual conduct after 1968. Id. at 257. The Army has not contested either of these rulings, and, on appeal, cites only Watkins' 1968 affidavit as evidence of homosexual conduct.

[3] Watkins had originally brought suit in August 1981 to have his security clearance reinstated, alleging various constitutional violations.

1-19(b), because they essentially repeated the discharge proceedings of 1975. Id. at 258-59.[4]

During oral argument before the district court, counsel for the Army declared that if the Army were enjoined from discharging Watkins, it would deny Watkins reenlistment, pursuant to AR 601-280, 2-21(c),[5] when his current tour of duty expired in October 1982.[6] This reenlistment regulation, which was promulgated in 1981 along with the discharge regulation AR 635-200, chpt. 15, is simply a clarification of the earlier regulation which had always made homosexuality a nonwaivable disqualification for reenlistment. The district court nonetheless enjoined Watkins' discharge, and the Army fulfilled its promise by rejecting Watkins' reenlistment application "[b]ecause of self admitted homosexuality as well as homosexual acts."

After receiving notice that discharge proceedings would be convened, he amended his complaint in October to seek an injunction against his discharge. The district court declined to reach the issue whether the Army could revoke Watkins' security clearance, reasoning that the issue was not yet ripe because Watkins had an administrative appeal pending. See 541 F. Supp. at 259; see also Watkins v. United States Army, 551 F. Supp. at 223. Watkins' security clearance dispute is thus not before us on appeal

[4] The district court held that the evidence could not support a finding that Watkins engaged in homosexual conduct subsequent to the 1975 discharge proceedings and that the Army's double jeopardy provision barred the Army from basing Watkins' discharge on statements that merely reiterated what Watkins had stated in the 1975 discharge proceedings—that he was homosexual. See 541 F. Supp. at 257-59.

[5] This reenlistment regulation, unlike the new discharge regulation, is simply a clarification of the pre-1981 reenlistment regulation. Throughout Watkins' 14 years in the Army, homosexuality was always a nonwaivable disqualification for reenlistment.

[6] At that time, the regulation appeared at 2-24(c). However, for convenience, this opinion will refer to all Army regulations by the paragraph numbers used in the Army's September 15, 1986 update, unless a different date is explicitly noted.

On October 5, 1982, the district court enjoined the Army from refusing to reenlist Watkins because of his admitted homosexuality, holding that the Army was equitably estopped from relying on the nonwaivable disqualification provisions of AR 601-280, 2-21(c). Watkins v. United States Army, 551 F. Supp. 212, 223 (W.D. Wash. 1982).[7] The Army reenlisted Watkins for a six-year term on November 1, 1982, with the proviso that the reenlistment would be voided if the district court's injunction were not upheld on appeal.

While the Army's appeal of the district court injunction was pending, the Army rated Watkins' performance and professionalism. He received 85 out of 85 possible points. His ratings included perfect scores for "Earns respect," "Integrity," "Loyalty," "Moral Courage," "Self-discipline," "Military Appearance," "Demonstrates Initiative," "Performs under pressure," "Attains results," "Displays sound judgment," "Communicates effectively," "Develops subordinates," "Demonstrates technical skills," and "Physical fitness." His military evaluators unanimously recommended that he be promoted ahead of his peers. The Army's written evaluation of Watkins' performance and potential stated:

> SSG Watkins is without exception, one of the finest Personnel Action Center Supervisors I have encountered. Through his diligent efforts, the Battalion Personnel Action Center achieved a near perfect processing rate for SIPDERS transactions. During this

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[7] This case does not involve a claim that courts can exercise general review of the Army's reenlistment decisions. Watkins does not seek a judicial determination of the merits of his reenlistment application. He merely seeks a judicial determination that the Army must consider his reenlistment application on its merits without regard to his homosexuality. See 551. F. Supp. at 218.

training period, SSG Watkins has been totally reliable and a wealth of knowledge. He requires no supervision, and with his "can do" attitude, always exceeds the requirements and demands placed upon him. I would gladly welcome another opportunity to serve with him, and firmly believe that he will be an asset to any unit to which he is assigned.

SSG Watkins should be selected to attend ANCOC and placed in a Platoon Sergeant position [Rater's Evaluation of Watkins' performance and potential.]

SSG Watkins' duty performance has been outstanding in every regard. His section continues to set the standard within the Brigade for submission of accurate, timely personnel and financial transactions. Keeping abreast of everchanging personnel regulations and directives, SSG Watkins has provided sound advice to the commander as well as to the soldiers within the command. His suggestion to separate S-1 and Personnel Action Center functions and to colocate the Personnel Action Center with the Company Orderly Rooms was adopted and immediately resulted in improved service by both offices. SSG Watkins' positive influence has been felt throughout the Battalion and will be sorely missed.

SSG Watkins' potential is unlimited. He has consistently demonstrated the capacity to manage numerous complex responsibilities concurrently. He is qualified for promotion now and should be selected for attendance at ANCOES at the earliest opportunity. [Indorser's Evaluation of Watkins' performance and potential.]

On appeal, a panel of this court reversed the district court's injunction. Watkins v. United States Army, 721 F.2d 687, 691 (9th Cir. 1983) [hereinafter Watkins I]. The panel reasoned that the equity powers of the federal courts

could not be exercised to order military officials to violate their own regulations absent a determination that the regulations were repugnant to the Constitution or to the military's statutory authority. Id. On remand, the district court held that the Army's regulations were not repugnant to the Constitution or to statutory authority and accordingly denied Watkins' motion for summary judgment and granted summary judgment in favor of the Army. Watkins again appealed and a divided panel of this court reversed the district court's ruling. The panel held that the Army's reenlistment regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation and because the regulations are not necessary to promote a legitimate compelling governmental interest. Watkins v. United States Army, 847 F.2d 1329, 1352-53 (9th Cir. 1988) [hereinafter Watkins II]. The full court granted review to address the issues raised in Watkins I [8] and Watkins II. We hold that the Army is estopped from barring Watkins' reenlistment on the basis of his homosexuality. Accordingly, Watkins I no longer states the law of this circuit. Moreover, it is unnecessary to reach the constitutional issues raised in Watkins II.

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[8] The law of the case doctrine does not, as the Army suggests, prevent us from reconsidering the issues raised in Watkins I. See, e.g., Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc) ("The law of the case doctrine . . . does not impair the power of an en banc court to overrule any panel decision."), cert. denied, 469 U.S. 1215 (1985); Van Gemert v. Boeing Co., 590 F.2d 433, 436-37 n.9 (2d Cir. 1978) (en banc) (law of the case doctrine cannot immunize panel decisions from review by the court en banc), aff'd 444 U.S. 472 (1980); cf. United States v. Mills, 810 F.2d 907, 909 (9th Cir. 1987) (stating that law of the case is a discretionary doctrine and declining to apply the doctrine), cert. denied, 108 S. Ct. 107 (1987).

II. EXHAUSTION OF REMEDIES

Before considering Watkins' estoppel claim, we must determine the preliminary question whether Watkins has exhausted available intraservice remedies. Watkins submitted a timely application for reenlistment to his commanding officer, Captain Scott, on July 26, 1982. Following an interview with Watkins, Captain Scott denied his reenlistment request on July 28, 1982 because of Watkins' admitted homosexuality.[9] The Army's position is that Watkins is ineligible for reenlistment due to a nonwaivable disqualification. Any further pursuit of intraservice remedies would therefore be fruitless. See Watkins, 551 F. Supp. at 217. As the district court stated, "This court will not require plaintiff to exhaust futile remedies." Id. at 218. See Southeast Alaska Conservaton Council, Inc. v. Watson, 697 F.2d 1305, 1309 (9th Cir. 1983) ("Exhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious, [or] where pursuit of administrative remedies would be a futile gesture . . ."). Because we find that Watkins has exhausted all effective intraservice remedies, we now proceed to review the merits of his estoppel claim.

III. EQUITABLE ESTOPPEL

A. Reviewability

This circuit and others have noted that not all actions by the military are reviewable in the courts. See Note,

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[9] Captain Scott also denied the reenlistment request because of Watkins' alleged refusal to answer questions concerning his homosexuality or homosexual acts. The district court found that this ground for the denial of Watkins' reenlistment request was totally unsupported by the evidence and therefore only reviewed Watkins' admitted homosexuality as a ground for denial of reenlistment. 551 F. Supp. at 217.

"Judicial Review of Constitutional Claims Against the Military," 84 Colum. L. Rev. 387, 397-403 (1984). In Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971), the Fifth Circuit articulated a test for ascertaining whether a particular internal military decision should be reviewed. Mindes cautioned that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations and (b) exhaustion of available intraservice corrective measures. Id. If the plaintiff meets both prerequisites, the court must weigh several factors to determine whether to grant review. These factors are (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved. Id.

We have adopted in part the Mindes test for judicial reviewability of internal military affairs. See Wallace v. Chappell, 661 F.2d 729, 733 n.4 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983). In Wallace, we applied the Mindes factors to constitutional claims, but declined to hold that the Mindes factors should be weighed in considering nonconstitutional claims. We stated that "[w]e express no view as to whether the Mindes test should govern federal nonconstitutional claims." Id. at 733 n.5.[10] Because in this case the district court found in favor of

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[10] Some of our cases following Wallace v. Chappell have used language indicating that an internal military decision is reviewable only when the plaintiff alleges a constitutional, statutory, or regulatory violation. See Christoffersen v. Washington State Air National Guard, 855 F.2d 1437, 1442 (9th Cir. 1988); Sandidge v. State of Washington, 813 F.2d 1025, 1026 (9th Cir. 1987); Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986); Khalsa v. Weinberger, 779 F.2d 1393, 1398 (9th Cir. 1985), reaff'd 787 F.2d 1288 (1986). Because we

Watkins on the nonconstitutional ground of equitable estoppel, we are now faced with the question whether the Mindes test is applicable to equitable estoppel.

In Watkins I, a panel of this court applied the Mindes doctrine to hold, in effect, that the only issues that can be reviewed in a suit against the military are claims that the Constitution, a statute, or a regulation has been violated. See Watkins v. United States Army (Watkins I), 721 F.2d 687, 690 (9th Cir. 1983). Watkins I, which no longer states the law of this circuit, held that our district courts may not use equitable estoppel principles to decide a case on its particular facts when the application of a statute or regulation is challenged as to one individual. Such an extension of the Mindes reviewability doctrine to bar equitable relief would improperly require cases against the military to be decided on the broadest possible grounds rather than on the narrowest. In this case, the panel's decision in Watkins I caused the district court and the three-judge panel to reach constitutional issues when the case could have been decided narrowly under the doctrine of equitable estoppel.

Accordingly, we conclude that the Mindes doctrine should not be extended to bar equitable estoppel against the military. The special factors that must be found before equitable estoppel can be applied against the government protect the same interests that the Mindes test was designed to protect. See Helm v. State of California, 722 F.2d 507, 509-10 (9th Cir. 1983) (applying the Mindes test to a constitutional claim against the military but not applying it to an assertion of equitable estoppel). The Mindes test was created to shield the military from unnecessary disruption. The estoppel doctrine, like the Mindes test, addresses the concerns of comity, prudence, and deference.

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hold that the Mindes doctrine does not apply to equitable estoppel against the military, see infra, its limitations on reviewability are not relevant here.

To estop an agency of the government a court must find affirmative misconduct by the government and must also find that the government's conduct will cause a serious injustice and that estoppel will not cause undue harm to the public interest. Wagner v. Director, Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988) (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)). The stringent requirements that must be satisfied before the government will be estopped safeguard the military from unjustified interference by the courts. Thus where estoppel obtains, there is simply no need to apply the reviewability factors of the Mindes test.

The facts of the instant case support this conclusion. To estop the Army from denying Sgt. Watkins reenlistment on the basis of his homosexuality would not disrupt any important military policies or adversely affect internal military affairs. It would simply require the Army to continue to do what it has repeatedly done for fourteen years with only positive results: reenlist a single soldier with an exceptionally outstanding military record.

B. Equitable Estoppel Against the Government

The Supreme Court has expressly left open the issue whether estoppel may run against the government, refusing to hold "that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Heckler v. Community Health Services of Crawford County, Inc. 467 U.S. 51, 60-61 (1984). It is well settled, however, that the government may not be estopped on the same terms as a private litigant. Id. at 60.

Our court has held that " 'where justice and fair play require it,' estoppel will be applied against the govern-

ment . . . ." Johnson v. Williford, 682 F.2d 868, 871 (9th Cir. 1982) (quoting United States v. Lazy FC Ranch, 481 F.2d 985, 988-89 (9th Cir. 1973)).[11] Our cases indicate that the principles allowing estoppel against the government also apply to the military when justified by the facts. See, e.g., Helm v. State of California, 722 F.2d 507 (9th Cir. 1983); Jablon v. United States, 657 F.2d 1064 (9th Cir. 1981); Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981). Before the government will be estopped, however, two additional elements must be satisfied beyond those required for traditional estoppel.[12] First, "[a] party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.' " Wagner v. Director, Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988) (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)).[13] In

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[11] " '[N]o fewer than eight circuits . . . have stated that there are some circumstances in which the Government will be estopped . . .' " Johnson, 682 F.2d at 871 (citations omitted).

[12] See infra section III(C) (discussing traditional estoppel).

[13] In Johnson, 682 F.2d at 871, we stated that estoppel may run against the government even when the government acts in its sovereign, as opposed to its proprietary, capacity if the effects of estoppel do not unduly damage the public interest. In Johnson, we further noted that in Saulque v. United States, 663 F.2d 968, 976 (9th Cir. 1981), we made the flat statement in dicta that the government may not be estopped when acting in its sovereign capacity. Id. at 871 n.1. We explained in Johnson that the facts of Saulque had not required an examination of the applicability of the exception spelled out in Lazy FC Rancy. Id. Thus Saulque does not preclude application of estoppel against the government when it is acting in its sovereign capacity.

the instant case, we must first determine whether the two threshold requirements for estopping the government are satisfied before deciding whether the traditional elements of estoppel are present.

1. *Affirmative Misconduct*

There is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances. Lavin v. Marsh, 644 F.2d at 1382-83 n.6. Affirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government, United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979), although it does not require that the government intend to mislead a party. Jablon v. United States, 657 F.2d at 1067 n.5. Finally, it is well settled that the government is not bound by the unauthorized acts of its agents. Saulque v. United States, 663 F.2d at 976 (citing Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917)); see also Federal Crop Insurance Co. v. Merrill, 332 U.S. 380, 384 (1947).

Here, the Army affirmatively misrepresented in its official records throughout Watkins' fourteen-year military career that he was qualified for reenlistment. On the one occasion when the record was unclear, Watkins sought clarification and his classification was immediately changed from "unknown" to "eligible for reentry on active duty." During this entire fourteen-year period, the Army's policy was that homosexuality constituted a nonwaivable disqualification for reenlistment. The Army has acknowledged, both in its brief in Watkins II and at oral argument before the en banc panel, that "[t]he 1981 regulations now in effect [AR 601-280, 2-21], which expressly bar enlistment or reenlistment of homosexuals, are regarded as a clarification, and not a change, of Army policy." Army's

Brief in Watkins I at 6.[14] Thus, the Army affirmatively acted in violation of its own regulations when it repeatedly represented that Watkins was eligible to reenlist, as well as when it reenlisted him time after time.

This case is readily distinguishable from Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981), where we refused to estop the Army from denying an Army Reserve officer's entitlement to pension benefits. In Lavin, the court found that while the Army had failed to determine Lavin's pension eligibility status or to counteract any misunderstanding resulting from recruiters' representations that benefits would be available to Lavin, this conduct did not amount to a "pervasive pattern of false promises" for which the government could be estopped. Id. at 1383. The court reasoned that although the Army's conduct was perhaps negligent, the "mere failure to inform or assist does not justify application of equitable estoppel." Id. at 1384 (citing INS v. Hibi, 414 U.S. 5, 8-9 (1973)). In addition, we stated that persons dealing with the government assume the risk that government agents may exceed their authority and provide misinformation, and observed that "Lavin chose trust over caution and he never attempted to confirm his eligibility." Id. at 1383.

In the present case, the Army's conduct went far beyond a mere failure to inform or assist. As the district court noted, the Army did not stand aside while Watkins reenlisted or accepted a promotion; it plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining,

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[14] The earlier opinions in this case discuss the 1981 reenlistment regulations as a policy change. See, e.g., Watkins I, 721 F.2d at 689-90. The change, however, went to discharge policy and not to enlistment policy. After 1981, Army boards reviewing discharge cases could no longer make exceptions to the policy against retention of homosexuals. The policy against enlistment or reenlistment of homosexuals never provided for any exceptions.

and promoting Watkins. 551 F. Supp. at 221. Furthermore, this case does not merely involve misinformation provided by government agents. Rather, it involves ongoing active misrepresentations by Army officials acting well within their scope of authority. "Without Army approval [Watkins] would not have been able to enter, remain or progress in the Army. The defendants point out that reenlistment is exclusively the Secretary's function. Here he exercised his authority three times . . . . To satisfy the element of affirmative misconduct the court need look no further." Id.[15]

2. ***Weighing the Injustice to Watkins against the Possibility of Damage to the Public Interest***

Even when affirmative misconduct has been shown, the government cannot be estopped unless its acts also threaten to work a serious injustice and the public's interest will not be unduly damaged by the imposition of estoppel. John-

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[15] In the district court, Watkins presented unrebutted evidence that a forged entry had been made on his Reenlistment Data Card. The entry was falsified so that it appeared to have been made on July 29, 1981 at a reenlistment interview with Captain Rodger L. Scott, Watkins' immediate commanding officer. The forged entry indicated that Watkins was not eligible for reenlistment due to his homosexuality. The entry stated that Watkins was "pending discharge." Watkins provided unrebutted testimony that this alleged interview never occurred and that an earlier entry, in the handwriting of Captain Scott, had been erased. The erased entry was still legible and showed that the Army had earlier found Watkins to be eligible for reenlistment. Watkins' testimony was corroborated by an unrebutted affidavit from a Sgt. Michael Austin. The original entry provides additional evidence of the Army's affirmative misconduct in continuing to find Watkins eligible for reenlistment despite the Army's awareness of his homosexuality. The erasure and the forged entry provide circumstantial evidence of a consciousness of misconduct on the part of the Army and an attempt to conceal that misconduct from exposure.

son, 682 F.2d at 871. This requirement involves a balancing of interests in individual cases. See Note, Equitable Estoppel of the Government, 79 Colum. L. Rev. 551, 551 (1979); see also, e.g., Johnson, 682 F.2d at 871-72 (where a prisoner was erroneously paroled, his subsequent successful reintegration into the community showed that his continuation on parole release did not seriously threaten the public interest. Furthermore, the frustration of the prisoner's expectation to continue, during good behavior, on parole release would be a serious injustice); Gestuvo v. District Director of INS, 337 F. Supp. 1093, 1102 (C.D. Cal. 1971) (estopping INS from refusing to revalidate approval of an immigrant's third preference classification partly because "[a]ny disruption of the nation's immigration policies that might result from the admission of this single individual into the country would, in short, be miniscule in comparison to the hardship to which he would be subjected by a failure to estop the Service").

The record in the instant case shows that Sgt. Watkins has greatly benefitted the Army, and therefore the country, by his military service. Even the Army's most recent written evaluation of Watkins, completed during the course of this legal action, contains nothing but the highest praise, describing Watkins' duty performance as "outstanding in every regard" and his potential as "unlimited." In addition, Watkins' homosexuality clearly has not hurt the Army in any way. In the words of an Army review board, "there is no evidence suggesting that [Watkins'] behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." As the district court aptly concluded:

> The injury to plaintiff from having relied on the Army's approval of his military career – and being denied it now – is the loss of his career. The harm to the public interest if reenlistment is not prevented is non-

> existent. Plaintiff has demonstrated that he is an excellent soldier. His contribution to this Nation's security is of obvious benefit to the public. Furthermore, when the government deals "carefully, honestly and fairly with its citizens," the public interest is likewise benefited.

551 F. Supp. at 223 (citation omitted).

C. Traditional Elements of Estoppel

Having concluded that this is a case in which estoppel may be asserted against the government, we must now decide whether the traditional elements of estoppel are present. Traditional estoppel requires the following:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Wharton, 514 F.2d 406, 412 (9th Cir. 1975) (quoting United States v. Georgia-Pacific Corp., 421 F.2d 92, 96 (9th Cir. 1970)). We adopt district judge Rothstein's thorough analysis of this question as follows.

1. *Did the Army know the facts?*

The district court recited the following as evidence that the Army knew about Watkins' homosexuality throughout his entire military career.

> At his preinduction physical examination in August 1967 plaintiff checked the box on his medical history chart indicating that he had homosexual tendencies. The examining psychiatrist apparently did not believe plaintiff and designated plaintiff as qualified for admission. In November 1968 plaintiff admitted his homo-

sexuality to an Army Criminal Investigation Division agent. Plaintiff was honorably discharged in May 1970 and his reenlistment code was listed as "unknown." Plaintiff requested correction of that code. The Army reclassified plaintiff as eligible for reentry on active duty, and in June 1971 plaintiff reenlisted for three years. In January 1972 plaintiff was denied a security clearance based on his 1968 admission of homosexuality. After another honorable discharge, in March 1974 plaintiff reenlisted for a six year term. In 1975 plaintiff's commander initiated discharge proceedings against plaintiff for unsuitability due to homosexuality. A four member board composed of a Major, two Captains and a First Lieutenant heard testimony establishing that plaintiff was homosexual. Plaintiff's commander, Captain Albert J. Bast III testified that plaintiff, who had told Bast he was homosexual, was "the best clerk I have known." First Sergeant Owen Johnson testified that everyone in the company knew plaintiff was homosexual and that plaintiff's homosexuality had not caused any problems. As noted earlier, the board recommended retention. In November 1977 plaintiff was granted a security clearance for information classified as "Secret." Plaintiff then applied for a position in the Nuclear Surety Personnel Reliability Program. Plaintiff was initially rejected because his medical records reflected his homosexuality. Plaintiff appealed. His commanding officer, Captain Dale. E. [Pastain], wrote in support of plaintiff's appeal, requesting that plaintiff be requalified notwithstanding plaintiff's record. An examining physician concluded that plaintiff's homosexuality caused no problems in his work. The Army requalified plaintiff for admission into the

> Program in July 1978. In October 1979 plaintiff reenlisted for three years.

551 F. Supp. at 220. Based on these undisputed facts, the district court stated that the Army's position that Army personnel responsible for Watkins' enlistment and reenlistments did not know that he was homosexual was "patently absurd." Id. "For the Army to acknowledge that it is aware of plaintiff's homosexuality when it comes to conducting criminal investigations, holding discharge proceedings, and revoking security clearances, but maintains that it is ignorant when four enlistments are at issue, suggests bad faith." Id. The district court concluded that the Deputy Chief of Staff for Personnel, who is primarily responsible for Army reenlistment, cannot be deemed to be unaware of the contents of Watkins' personnel file. Id.

2. ***Did the Army Intend that Watkins Act in Reliance on its Conduct, or Did the Army Act so that Watkins Had a Right to Believe the Army so Intended?***

The district court found that this element of estoppel was satisfied because, regardless of what the Army actually intended, Watkins had a right to believe the Army intended him to rely on its acts. 551 F. Supp. at 221-22. The district court rejected the Army's contention that Watkins had assumed the risk that his Army career would be discontinued at any time because of his homosexuality. Id. at 222. In light of Watkins' candor from the beginning about his homosexuality and the Army's ongoing acts in violation of its regulations,[16] the district court found that "[t]aken together, over a career spanning more than 14 years, those acts amounted almost to a policy of ignoring

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[16] As the district court noted, the decisions to enlist, to reenlist, to retain, and to promote a soldier are serious and well-considered decisions by the military. Id.

this servicemember's homosexuality. As a matter of law, the court concludes that the second element of plaintiff's estoppel claim has been satisfied." Id.[17] See also Johnson, 682 F.2d at 872 (prisoner had right to believe, after his parole computation erroneously had passed successfully through eight administrative reviews, culminating in his ultimate release on parole for fifteen months, that he would remain on parole during good behavior).

3. *Was Watkins Ignorant of the True Facts?*

The district court stated that the "true fact" here is that homosexuality is a nonwaivable disqualification for reenlistment to which the Army cannot grant exceptions. 551 F. Supp. at 222. The Army's repeated waiver of this disqualification makes it impossible for us to charge Watkins with the knowledge that the disqualification was in fact nonwaivable. Id. See Johnson, 682 F.2d at 872 (government's active misadvice to prisoner regarding his eligibility for parole prevented court from charging prisoner with even constructive knowledge of proper meaning of statute in question).

4. *Did Watkins Rely to his Injury on the Army's Conduct Concerning his Homosexuality?*

Regarding this fourth element, the district court stated:

> Tied up in litigation, less than six years from retirement, having invested a total of more than 14 years in the Army, it is not difficult to see that plaintiff has relied to his injury on the many "green lights" he re-

[17] We emphasize that Watkins' claim is not based on any alleged right, contractual or otherwise, to reenlist in the Army. There is no such right. Rather, he argues that the Army's misconduct requires that the Army be estopped from denying his eligibility for reenlistment on the basis of his homosexuality.

> ceived from Army representatives. Plaintiff developed skills necessary for military employment and refrained from developing skills suitable for civilian jobs. He worked more than 14 years toward a retirement benefit that he could have sought elsewhere. Had the Army refused plaintiff reenlistment in the past, plaintiff would not have lost the opportunity for civilian employment that would have brought him to a point of equivalent achievement.

551 F. Supp. at 223. We agree with District Judge Rothstein that the four elements of traditional estoppel are present in this case.

IV. CONCLUSION

This is a case where equity cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality. We therefore reinstate the district court's October 5, 1982 Order estopping the Army from relying on its reenlistment regulation, AR 601-280 2-24(c), as a bar to Sgt. Watkins' reenlistment. See 551 F. Supp. at 223.[18]

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[18] Our holding does not mean and should not be read to imply that Watkins has a right to commit acts that Congress has declared illegal. See Watkins, 551 F. Supp. at 225. We do nevertheless reiterate the point made in the district court's October 28, 1982 Order "that the Army cannot, consistent with the [district] court's October 5 Order, use plaintiff's homosexuality as an open door through which to probe for possible misconduct, when it has no grounds to believe such misconduct exists." 551 F. Supp. at 225.

In addition, we note that the district court found that the Army's attempt to discharge Watkins in 1982 was barred by the Army's regulation against double jeopardy, AR 635-200, 1-19(b)(2), because the 1982 discharge proceedings essentially repeated the 1975 discharge proceedings against Watkins. 541 F. Supp. at 257-58. The Army did not appeal from that judgment. Therefore, the Army may not attempt

Our opinions in Watkins I and Watkins II are withdrawn. The district court Order of June 17, 1985 is vacated and the district court Order of October 5, 1982 is AFFIRMED.

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to discharge Watkins for any alleged homosexual acts that were the subject of past discharge proceedings or for any past or future statements by Watkins acknowledging his homosexuality.

WATKINS v. U.S. ARMY
No. 85-4006

CANBY, Circuit Judge, concurring:

I concur wholeheartedly in Judge Pregerson's majority opinion. My concurrence indicates no retreat, however, from my conviction that the Army's discrimination against Watkins because of his homosexual orientation denies him equal protection of the laws. I joined Judge Norris' eloquent opinion so holding in Watkins II, and I agree with everything Judge Norris says today on the equal protection point. Because we are en banc, and the constitutional issue is a recurring one, I think I may appropriately reach it even though equitable estoppel may dispose of the case.

WATKINS *v.* U.S. ARMY
No. 85-4006

NORRIS, Circuit Judge, concurring in the judgment:

I

I concur in the judgment requiring the Army to reconsider Sgt. Watkins' reenlistment application without regard to his homosexuality. I cannot join the majority's opinion, however, because I agree with the dissent that the judgment cannot rest on the doctrine of equitable estoppel. The Supreme Court has declined to approve the invocation of equitable estoppel against the government even in cases where the facts are no less sympathetic than the facts in Sgt. Watkins' case. See, e.g., INS v. Miranda, 459 U.S. 14, 17-19 (1982) (per curiam) (reversing Ninth Circuit decision equitably estopping INS from denying resident status to alien spouse of citizen when petitioner became ineligible during INS delay in processing application); INS v. Hibi, 414 U.S. 5 (1973) (per curiam) (reversing Ninth Circuit decision equitably estopping INS from denying citizenship to Filipino war veteran); Montana v. Kennedy, 366 U.S. 308, 314-15 (1961) (government not estopped to deny citizenship to child of U.S. citizen born while his mother was living abroad, even though government official advised her that she could not return to the U.S. to have her baby). Indeed, the Supreme Court has expressed uncertainty as to whether equitable estoppel can ever be invoked against the government. See Heckler v. Community Health Servs., 467 U.S. 51, 60-61 (1984). In any event, I see no justification for invoking the doctrine on the facts of this case.

In my view, Watkins is entitled to relief because the Army denied him the equal protection of the laws by discharging and refusing to reenlist him solely on the basis of

his homosexuality. Before addressing Watkins' claim that the Army's regulations on homosexuality violate equal protection, however, I must address Watkins' non-constitutional claim—that the Army's discharge and reenlistment regulations are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706(2)(a).[1] I reject this claim because Watkins does not argue that the Army's regulations on homosexuality themselves violate the Administrative Procedure Act; rather he argues only that the regulations are arbitrary as applied to the facts of his case. Because he does not argue that the regulations on their face are arbitrary or capricious, Watkins' APA claim must fail. See Watkins I, 721 F.2d at 690-91.

I now turn to Watkins' claim that the Army's regulations deny him equal protection of the laws in violation of the Fifth Amendment.[2] Watkins argues that the Army's regulations constitute an invidious discrimination based on sexual orientation.[3] To evaluate this claim I must en-

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[1] Because I would grant Watkins the relief he seeks on the basis of his equal protection claim, I need not address in this concurring opinion Watkins' other constitutional claims involving the free speech clause, the petition clause, and the due process entrapment doctrine.

[2] The equal protection component of the Fifth Amendment imposes precisely the same constitutional requirements on the federal government as the equal protection clause of the Fourteenth Amendment imposes on state governments. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[3] In this opinion I use the term "sexual orientation" to refer to the orientation of an individual's sexual preference, not to his actual sexual conduct. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the opposite sex have a heterosexual orientation. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the same sex have a homosexual orientation.

In contrast, I use the terms "homosexual conduct" and "homosexual acts" to refer to sexual activity between two members of the same sex

gage in a three-stage inquiry. First, I must decide whether the regulations in fact discriminate on the basis of sexual orientation. Second, I must decide which level of judicial scrutiny applies by asking whether discrimination based on sexual orientation burdens a suspect or quasi-suspect class,[4] which would make it subject, respectively, to strict or intermediate scrutiny. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-41 (1985). If the discrimination burdens no such class, it is subject to ordinary rationality review. Id. Finally, I must decide whether the challenged regulations survive the applicable level of scrutiny by deciding whether, under strict scrutiny, the legal classification is necessary to serve a compelling governmental interest; whether, under intermediate scrutiny, the classification is substantially related to an important governmental interest; or whether, under rationality review, the classification is rationally related to a legitimate governmental interest. See id.

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whether their orientations are homosexual, heterosexual, or bisexual, and we use the terms "heterosexual conduct" and "heterosexual acts" to refer to sexual activity between two members of the opposite sex whether their orientations are homosexual, heterosexual, or bisexual.

Throughout this opinion, the terms "gay" and "homosexual" will be used synonymously to denote persons of homosexual orientation.

[4] Discriminations that burden some despised or politically powerless groups are so likely to reflect antipathy against those groups that the classifications are inherently suspect and must be strictly scrutinized. See, e.g., Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). Such groups are generally termed "suspect classes." The Supreme Court has identified other groups whose history of past discrimination entitles them to intermediate scrutiny protection under equal protection doctrine. Such groups are termed "quasi-suspect" classes. See generally, Nowak, Rotunda & Young, Constitutional Law, Ch. 16, 1, at 593 (2d ed. 1983).

II

I turn first to the threshold question raised by Watkins' equal protection claim: Do the Army's regulations discriminate on the basis of sexual orientation? The portion of the Army's reenlistment regulation that bars homosexuals from reenlisting states in full:

> Applicants to whom the disqualification below apply are ineligible for RA [Regular Army] reenlistment at any time and requests for waiver or exception to policy will not be submitted. . . .
>
> c. Persons of questionable moral character and a history of antisocial behavior, sexual pervision or homosexuality. A person who has committed homosexual acts or is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service is included. (See note 1). . . .
>
> k. Persons being discharged under AR 635-200 for homosexuality. . . .
>
> Note: Homosexual acts consist of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual satisfaction, or any proposal, solicitation, or attempt to perform such an act. Persons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiousity [sic], or intoxication, and in the absence of other evidence that the person is a homosexual, normally will not be excluded from reenlistment. A homosexual is a person, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent to obtain or give sexual gratification. Any official, private, or public profession of homo-

> sexuality, may be considered in determining whether a person is an admitted homosexual.

AR 601-280, 2-21. Although worded in somewhat greater detail, the Army's regulation mandating the separation of homosexual soldiers from service (discharge), AR 635-200, is essentially the same in substance.[5]

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[5] AR 635-200 provides:

15-2 Definitions . . .

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

c. A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.

15-3 Criteria

The basis for separation may include preservice, prior service, or current service conduct or statements. A soldier will be separated per this chapter if one or more of the following approved findings is made:

a. The soldier has engaged in, attempted to engage in, or solicited another to engage in a homosexual act unless there are further approved findings that—

(1) Such conduct is a departure from the soldier's usual and customary behavior; and

(2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and

(4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and

On their face, these regulations discriminate against homosexuals on the basis of their sexual orientation. Under the regulations any homosexual act or statement of

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(5) The soldier does not desire to engage in or intend to engage in homosexual acts.

Note: To warrant retention of a soldier after finding that he or she engaged in, attempted to engage in, or solicited another to engage in a homosexual act, the board's findings must specifically include all five findings listed in a(1) through (5) above. In making these additional findings, boards should reasonably consider the evidence presented. For example, engagement in homosexual acts over a long period of time could hardly be considered "a departure from the soldier's usual and customary behavior." The intent of this policy is to permit retention only of nonhomosexual soldiers who, because of extenuating circumstances (as demonstrated by findings required by para 15-3a(1) through (5)) engaged in, attempted to engage in, or solicited a homosexual act.

b. The soldier has stated that he or she is a homosexual or bisexual, unless there is a further finding that the soldier is not a homosexual or bisexual.

c. The soldier has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the person involved) unless there are further findings that the soldier is not a homosexual or bisexual (such as, where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

AR 635-200, 15-2 & 15-3 (emphasis in original).

Although it is the Army's refusal to reenlist Watkins because of his homosexuality that is directly at issue, Watkins' challenge to the Army's regulation on discharge is relevant to this appeal for two reasons: (1) persons being validly discharged for homosexuality at the time of reenlistment, as Watkins was, cannot reenlist under 601-280 2-21(k); (2) enjoining the Army to consider Watkins' reenlistment application without regard to his homosexuality will provide no effective relief if he would be subject to mandatory discharge because of homosexuality as soon as he was reenlisted. I thus consider Watkins' challenge to the constitutionality of the Army's discharge regulation as well as its reenlistment regulation.

homosexuality gives rise to a presumption of homosexual orientation, and anyone who fails to rebut that presumption is conclusively barred from Army service. In other words, the regulations target homosexual orientation itself. The homosexual acts and statements are merely relevant, and rebuttable, indicators of that orientation.

In spite of these facial appearances, the Army argues that its regulations target homosexual conduct rather than orientation. I cannot agree. A close reading of the complex regulations leaves no room for doubt that the regulations target orientation rather than conduct.

Under the Army's regulations, "homosexuality," not sexual conduct, is clearly the operative trait for disqualification. AR 601-280, 2-21(c); see also AR 635-200, 15-1(a) (articulating the same goal). For example, the regulations ban homosexuals who have done nothing more than acknowledge their homosexual orientation even in the absence of evidence that the persons ever engaged in any form of sexual conduct. The reenlistment regulation disqualifies any "admitted homosexual"—a status that can be proved by "[a]ny official, private, or public profession of homosexuality" even if "there is no evidence that they have engaged in homosexual acts either before or during military service." AR 601-280, 2-21(c) & note; see also AR 635-200, 15-3(b). Since the regulations define a "homosexual" as "a person, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent to obtain or give sexual gratification," a person can be deemed homosexual under the regulations without ever engaging in a homosexual act. 601-280, 2-21(c) & note (emphasis added); see also A.R. 635-200, 15-2(a) (same desire sufficient to make one homosexual). Thus, no matter what statements a person has made, and what conduct he or she has engaged in, the ultimate evidentiary issue is whether he

or she has a homosexual orientation. Under the reenlistment regulation, persons are disqualified from reenlisting only if, based on any "profession of homosexuality" they have made, they are found to have a homosexual orientation. AR 601-280, 2-21(c) & note. Similarly, under the discharge regulation a soldier must be discharged if "[t]he soldier has stated that he or she is a homosexual or bisexual, unless there is a further finding that the soldier is not a homosexual or bisexual." AR 635-200, 15-3(b) (emphasis added). In short, the regulations do not penalize all statements of sexual desire, or even only statements of homosexual desire; they penalize only homosexuals who declare their homosexual orientation.

True, a "person who has committed homosexual acts" is also presumptively "included" under the reenlistment regulation as a person excludable for "homosexuality." AR 601-280, 2-21(c); see also AR 635-200, 15-3(a). But it is clear that this provision is merely designed to round out the possible evidentiary grounds for inferring a homosexual orientation. The regulations define "homosexual acts" to encompass any "bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual satisfaction, or any proposal, solicitation, or attempt to perform such an act." AR 601-280, 2-21(c) & note; see also AR 635-200, 15-2(c) & 15-3(a) (stating the same in slightly different order). Thus, the regulations barring homosexuals from the Army cover any form of bodily contact between persons of the same sex that gives sexual satisfaction—from oral and anal intercourse to holding hands, kissing, caressing and any number of other sexual acts. Indeed, in this case the Army tried to prove at Watkins' discharge proceedings that he had committed a homosexual act described as squeezing the knee of a male soldier, but failed to prove it was Watkins who did the alleged knee-

squeezing. Moreover, even non-sexual conduct can trigger a presumption of homosexuality: The regulations provide for the discharge of soldiers who have "married or attempted to marry a person known to be of the same sex . . . unless there are further findings that the soldier is not a homosexual or bisexual." AR 635-200, 15-3(c) (emphasis added). With all the acts and statements that can serve as presumptive evidence of homosexuality under the regulations, it is hard to think of any grounds for inferring homosexual orientation that are not included.[6] The fact remains, however, that homosexual orientation, not homosexual conduct, is plainly the object of the Army's regulations.

Moreover, under the regulations a person is not automatically disqualified from Army service just because he or she committed a homosexual act. Persons may still

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[6] In stark contrast to the breadth and focus of the regulations, the only statute Congress has enacted regulating the private consensual sexual activity of military personnel covers only sodomy, not other forms of sexual conduct, and covers sodomy whether engaged in by homosexuals or heterosexuals. 10 U.S.C. 925 (1982) provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Although the statute does not define "sodomy" or "unnatural carnal copulation," the statute does require proof of "penetration," which apparently limits sodomy to oral and anal copulation. See United States v. Harris, 8 M.J. 52, 53-59 (C.M.A. 1979).

The Army has never made a finding that Watkins ever engaged in an act of sodomy in violation of section 925. Indeed, the Army twice investigated Watkins for allegedly committing sodomy in violation of section 925 and had to drop both investigations because of "insufficient evidence."

qualify for the Army despite their homosexual conduct if they prove to the satisfaction of Army officials that their orientation is heterosexual rather than homosexual. To illustrate, the discharge regulation provides that a soldier who engages in homosexual acts can escape discharge if he can show that the conduct was "a departure from the soldier's usual and customary behavior" that "is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service" and that the "soldier does not desire to engage in or intend to engage in homosexual acts." AR 635-200, 15-3(a). The regulation expressly states, "The intent of this policy is to permit retention only of nonhomosexual soldiers who, because of extenuating circumstances engaged in, attempted to engage in, or solicited a homosexual act." Id. at note (emphasis in original). Similarly, the Army's ban on reenlisting persons who have committed homosexual acts does not apply to "[p]ersons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiousity [sic], or intoxication, and in the absence of other evidence that the person is a homosexual." AR 601-280, 2-21 note. If a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated. In short, the regulations do not penalize soldiers for engaging in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay.[7]

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[7] This reading of the regulations is supported by the Army's treatment of Watkins himself. The only evidence that Watkins ever engaged in homosexual conduct is a statement he made during a 1968

In sum, the discrimination against homosexual orienta tion under these regulations is about as complete as on could imagine. The regulations make any act or statemen that might conceivably indicate a homosexual orientatio evidence of homosexuality; that evidence is in turn weighed against any evidence of a heterosexual orienta tion. It is thus clear in answer to my threshold equal pro tection inquiry that the regulations directly burden the class consisting of persons of homosexual orientation.

III

A

Before reaching the question of the level of scrutiny ap plicable to discrimination based on sexual orientation and the question whether the Army's regulations survive the applicable level of scrutiny, I first address the Army's argument that Bowers v. Hardwick, 478 U.S. 186 (1986), forecloses Watkins' equal protection claim. In Hardwick, the Court rejected a claim by a homosexual that a Georgia statute criminalizing sodomy deprived him of his liberty without due process of law in violation of the Fourteenth Amendment. More specifically, the Court held that the

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investigation that he committed homosexual acts with two other serv icemen. When these two servicemen denied engaging in homosexual acts with Watkins, the Army discontinued the investigation without making a finding that Watkins had committed homosexual acts. The Army did not decide to discharge Watkins (any deny him reenlist ment) until 1981. In the meantime, Watkins openly and repeatedly acknowledged his homosexual orientation without admitting to any homosexual acts. It strains credulity to think that the Army decided to discharge Watkins and deny him reenlistment solely on the basis of his contradicted statement in 1968 that he had committed homosexual acts. Plainly it is Watkins' homosexual orientation—rather than evidence of any conduct—that explains the Army's decision to end Watkins' Army career.

constitutionally protected right to privacy—recognized in cases such as Griswold v. Connecticut, 381 U.S. 429 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972)—does not extend to acts of consensual homosexual sodomy.[8] See id. at 190-96. The Court's holding was limited to this due process question. The parties did not argue and the Court explicitly did not decide the question whether the Georgia sodomy statute might violate the equal protection clause. See id. at 196, n.8.[9]

The Army nonetheless argues that it would be "incongruous" to hold that its regulations deprive gays of equal protection of the laws when Hardwick holds that there is no constitutionally protected privacy right to engage in homosexual sodomy. Army's Second Supp. Brief at 19. I could not disagree more. First, while Hardwick does indeed hold that the due process clause provides no sub-

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[8] Under the Court's analysis, because the Constitution's protection of the right to privacy does not extend to homosexual sodomy, a judgment by the state that sodomy is immoral provides a sufficiently rational basis for sodomy laws to satisfy the requirements of substantive due process. See Hardwick at 196.

[9] See also Hardwick, 478 U.S. at 201 (Blackmun, J., dissenting) (Court "refused to consider" equal protection clause); Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986), aff'd in part, rev'd in part sub. nom, Webster v. Doe, 108 S. Ct. 2047 (1988) ("Although . . . the Supreme Court's recent decision in Bowers v. Hardwick [held] that homosexual conduct is not constitutionally protected, the Court did not reach the different issue of whether an agency of the federal government can discriminate against individuals merely because of sexual orientation." (Footnotes omitted and emphasis in the original.)); Swift v. United States, 42 FEP Cases (BNA) 787, 790 (D.D.C. 1987) ("this Circuit has declined to reach [Hardwick] as barring claims of discrimination based on sexual preference"); but cf. Padula v. Webster, 822 F.2d 997 (D.C. Cir. 1987) ("reasoning in Hardwick forecloses . . . suspect class status for practicing homosexuals").

stantive privacy protection for acts of private homosexual sodomy, nothing in Hardwick suggests that the state may penalize gays merely for their sexual orientation. Cf. Robinson v. California, 370 U.S. 660 (1962) (holding that state violated due process by criminalizing the status of narcotics addiction, even though the state could criminalize the use of the narcotics—conduct in which narcotics addicts by definition are prone to engage). In other words, the class of persons involved in Hardwick—those who engage in homosexual sodomy—is not congruous with the class of persons targeted by the Army's regulations—those with a homosexual orientation. Hardwick was a "conduct" case; Watkins' is an "orientation" case.[10]

Second, and more importantly, Hardwick does not foreclose Watkins' claim because Hardwick was a due process, not an equal protection case.[11] Although the

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[10] One commentator and one district court have already agreed with Watkins II that the conduct-orientation dichotomy is a valid way of distinguishing Watkins' case from Hardwick. As Professor Sunstein has written, "this feature [the conduct/orientation distinction] serves to distinguish [Watkins from] Hardwick in a persuasive way. . . ." Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1162 n. 9 (1988).

In BenShalom v. Secretary of Army, No. 88-C-468 (Jan. 10. 1989) (LEXIS, U.S. Dist. 1989), the District Court for the Eastern District of Wisconsin prevented the Army from denying reenlistment to Sergeant BenShalom under the same regulations Watkins challenges. The district court based this decision on both the First Amendment and the equal protection component of the Fifth Amendment. In analyzing BenShalom's equal protection claim, the district court tracked the equal protection analysis of Watkins II, relying heavily on the conduct/orientation distinction.

[11] Thus, whether the Army's regulations are "conduct-based" or "orientation-based," Hardwick cannot be read to foreclose Watkins' equal protection claim. Professor Sunstein agrees, noting that "Hard-

Army acknowledges, as it must, that Hardwick does not discuss equal protection explicitly, the Army nonetheless argues that Hardwick's discussion of due process has equal protection implications. Specifically, the Army argues that the Hardwick Court, in holding that the criminalization of homosexual sodomy does not violate due process, decided sub silentio that the criminalization of heterosexual sodomy would violate due process. The Army concludes from this that Hardwick is controlling precedent that the government may discriminate against homosexuals without violating equal protection.

Both the premise and the conclusion of the Army's argument are mistaken. In the first place, Hardwick did not decide sub silentio that heterosexual sodomy is constitutionally protected: Indeed, the Court expressly refused to take a position on whether heterosexual sodomy was protected by the due process clause.[12] Second, even if we accept, arguendo, the Army's premise that the Hardwick Court drew a distinction between homosexual sodomy and heterosexual sodomy for due process purposes, such a distinction under the due process clause would have no bearing on whether the equal protection clause nonetheless prohibits official discrimination against homosexuals. I discuss these points in turn.

Implicit in the Army's position is the proposition that the Court in Hardwick somehow did decide that the due process clause prohibits a state from criminalizing hetero-

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wick . . . was interpreted correctly in the majority opinion in Watkins[II], and misread in . . . Judge Reinhardt's opinion in Watkins[II]. . . . [Because Hardwick involved due process rather than equal protection], Watkins can be distinguished from Hardwick even if the former decision were to be applied to a class of people including some, many or all who engage in the conduct at issue in Hardwick." Sunstein, supra note 10, at 1162 & n.9.

[12] See Hardwick, 478 U.S. at 188 n.2.

sexual sodomy. That is, the Army reads Justice White's opinion in Hardwick as extending the zone of privacy first recognized in Griswold to heterosexual sodomy, thus drawing a due process line between heterosexual and homosexual sodomy. That reading of Hardwick flies directly in the face of footnote 2, which expressly reserves the question of the constitutionality of the Georgia statute as applied to heterosexual sodomy. See 478 U.S. at 188 n.2.[13]

Even apart from the Court's express reservation of this question, the Army's reading of Hardwick is untenable. I see no basis for reading Hardwick as holding sub silentio that a right to engage in heterosexual sodomy is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty"—which would be necessary for heterosexual sodomy to qualify for due process protection under Hardwick's analysis.[14] Note that when the Court found the suggestion that homosexual sodomy qualified for due process protection to be "at best, facetious," 478 U.S. at 194, it relied upon the historical fact that sodomy was a criminal offense at common law, under the laws of all 13 colonies, and, until 1961, under the laws of all 50 states. 478 U.S. at 192-94. Note further that the Court did not find it significant that these laws, as Justice Stevens pointed out in his dissent, drew no distinction between homosexual and heterosexual sodomy. See

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[13] "The only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Hardwick, 478 U.S. at 188 n.2 (emphasis added).

[14] See Hardwick, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (Opinion of Powell, J.)).

478 U.S. at 214-15.[15] They outlawed all acts of sodomy, both homosexual and heterosexual.

In light of the historical record relied upon by the Court, there is no way to read Hardwick as establishing that heterosexual sodomy is "deeply rooted in this Nation's history and tradition" while homosexual sodomy is not. I find it untenable, then, to interpret Hardwick as extending due process protection to heterosexual conduct while denying such protection to homosexual conduct. It is hard to imagine that the Court in Hardwick intended to suggest that acts of heterosexual sodomy implicate higher constitutional values than acts of homosexual sodomy.

Even if, as the Army implicitly argues, Hardwick did in fact extend constitutional protection to heterosexual sodomy while denying it to homosexual sodomy, such a differentiation between heterosexual and homosexual sodomy for due process purposes would have no bearing—none—on the entirely separate question whether official discrimination against homosexuals violates the equal protection clause. The relevant inquiry in equal protection jurisprudence is fundamentally different from the relevant due process inquiry. The due process clause, as the Court recognized in Hardwick, protects practices which are "deeply rooted in this Nation's history and tradition." The equal protection clause, in contrast, protects minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to call into question such values

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[15] See also Anne Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick 97 Yale L. J. 1073, 1084-85 (1988) (state laws relied upon by majority outlawed all sodomy, whether homosexual or heterosexual). Moreover, Congress has no distinguished between heterosexual and homosexual sodomy in proscribing acts of sodomy by members of the armed forces. See supra note 6.

and practices when they operate to burden disadvantaged minorities. As Professor Sunstein puts it:

> From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.
>
> The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks.

Sunstein, supra note 10, at 1163.

The Supreme Court did not decide in Hardwick – and indeed has never decided in any case – whether discrimination against homosexuals violates equal protection. All Hardwick decided is that homosexual sodomy is not a practice so "deeply rooted in this Nation's history and tradition" that it falls within the zone of personal privacy protected by the due process clause. It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that

because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions precisely because homosexuals have historically been subjected to invidious discrimination. In any case, homosexuals do not become "fair game" for discrimination simply because their sexual practices are not considered part of our mainstream traditions.

A hypothetical may help make the point. Suppose a city passed a "single family occupancy" housing ordinance allowing only members of the immediate, nuclear family to live in the same house.[16] Suppose further that a disproportionate number of black families in the community lived together in extended families that included, for example, cousins and grandparents.[17] Finally, suppose the ordinary was motivated by a racially discriminatory purpose.[18] A black family challenging the ordinance could raise a due process claim, arguing that the ordinance impermissibly intruded on "deeply rooted" family traditions. In real life, the Court found such a due process claim persuasive.[19] But suppose the Court had rejected the due process claim. Suppose the Court had instead agreed with the city of East Cleveland that the privacy interests protected by the Constitution do not include extended family

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[16] This example is loosely drawn from Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[17] See Moore, 431 U.S. at 509 (Brennan, J., concurring) (indicating this was the case in East Cleveland).

[18] I should make clear that this was not shown to be the case in Moore. See 431 U.S. at 510 (Brennan, J., concurring).

[19] See Moore, 431 U.S. at 505-06 (plurality opinion).

relationships—that the due process clause does not "giv grandmothers any fundamental rights with respect t grandsons."[20] In that event, the black family could sti challenge the ordinance on equal protection ground arguing that the ordinance discriminated against black Could anyone seriously maintain that the Court's hypo thetical refusal to give due process protection to "extende family" living would have any bearing on the blac family's equal protection claim? Of course not. And th black family's equal protection claim would be no les viable even if the Court in the hypothetical had ruled tha due process does protect the nuclear family (in the hypo thetical, the form disproportionately favored by the white in the community) but does not protect the extended fami ly (disproportionately favored by blacks).

The relationship between Hardwick and Watkins' case is exactly the same as the relationship between the due proc ess and equal protection claims in this hypothetical. Whether homosexual conduct is protected by the due process clause is an entirely separate question from whether the equal protection clause prohibits discrimination against homosexuals. And in answering this latter question, it makes no difference whether the Hardwick Court intended to extend due process protection to hetero sexual conduct, but not homosexual conduct. In sum, the equal protection question presented by Sgt. Watkins simply is not answered—not in the slightest—by Hard wick.

The Army also argues that Hardwick's concern "about the limits of the Court's role in carrying out its constitutional mandate," 478 U.S. at 190, should prevent courts from holding that equal protection doctrine protects homosexuals from discrimination. To be sure, the Court

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[20] See 431 U.S. at 500 (plurality opinion) (quoting city's argument).

in Hardwick justified its decision to cabin the right to privacy largely by pointing to the problems allegedly created when judges recognize constitutional "rights not readily identifiable in the Constitution's text" and "having little or no cognizable roots in the language or design of the Constitution." 478 U.S. at 191, 194. The Court stressed its concern that such rights might be perceived as involving "the imposition of the Justices' own choice of values on the States and the Federal Government" and that this antidemocratic perception might undermine the legitimacy of the Court. Id. Finally, the Court expressed the more specific concern about potential difficulties in defining the contours of the right to privacy. See id. at 195-96.

Whatever one might think about the Hardwick Court's concerns about substantive due process in general and the right of privacy in particular, these concerns have little if any relevance to equal protection doctrine.[21] The right to equal protection of the laws has a clear basis in the text of the Constitution. This principle of equal treatment, when imposed against majoritarian rule, arises from the Constitution itself, not from judicial fiat. Moreover, equal protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. Indeed, equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy

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[21] Professor John Hart Ely, for example, has severely criticized the Supreme Court's substantive due process analysis in Roe v. Wade, 410 U.S. 113 (1973), while at the same time expressing the view that governmental classifications burdening homosexuals merit heightened scrutiny under the equal protection clause. Compare J. Ely, Democracy and Distrust 248 n.52 (1980), with id. at 162-64.

of majority rule by safeguarding minorities from major
tarian oppression. The requirement of evenhandedne
also facilitates a representation of minorities in governme
that advances the operation of representative democracy.
Finally, the practical difficulties of defining the requir
ments imposed by equal protection, while not insignif
cant, do not involve the judiciary in the same degree
value-based line-drawing that the Supreme Court in Har
wick found so troublesome in defining the contours
substantive due process. In sum, the driving force behin
Hardwick is the Court's ongoing concern with the expan
sion of rights under substantive due process, not an u
bounded antipathy toward a disfavored group.

B

The Army also relies upon Beller v. Middendorf, 63
F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981
Hatheway v. Secretary of the Army, 641 F.2d 1376 (9t
Cir.), cert. denied, 454 U.S. 864 (1981), and DeSantis
Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), t
argue that the Ninth Circuit has already rejected the kin
of equal protection attack Watkins makes. In my view, th
equal protection question Watkins raises—whether th
Army's regulation should be subjected to strict scrutin
because homosexuals constitute a suspect class—was n
addressed in any of these Ninth Circuit cases.

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[22] See generally J. Ely, supra note 21, at 101-02 ("unlike an a
proach geared to the judicial imposition of 'fundamental values,' th
representation-reinforcing [approach] . . . is not inconsistent wit
but to the contrary is entirely supportive of, the American system
representative democracy. It recognizes the unacceptability of th
claim that appointed and life-tenured judges are better reflectors
conventional values than elected representatives, devoting itself i
stead to policing the mechanisms by which the system seeks to ensu
that our elected representatives will actually represent.").

The Army's reliance on Beller is misplaced because Beller, like Hardwick, is a substantive due process case, not an equal protection case. In rejecting a substantive due process challenge to Navy regulations providing for the discharge of personnel who engaged in homosexual acts, our court held in Beller that substantive due process required only the courts balance the governmental and individual interests at stake in a fashion similar to intermediate scrutiny. Beller, 632 F.2d at 805-12. As now-Justice Kennedy's carefully tailored opinion makes clear, Beller's appeal did "not require us to address the question whether consensual private homosexual conduct is a fundamental right as that term is used in equal protection . . . [and was] not presented to us as implicating a suspect or quasi-suspect classification. . . . Substantive due process, not equal protection, was the basis of the constitutional claim, and we address the case in those terms." Id. at 807. Thus, Beller, like Hardwick, has no relevance to Watkins' claim that the challenged governmental regulations discriminate against a suspect class in violation of equal protection doctrine. See Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc) (a prior decision is not precedent on issues that were neither raised by counsel nor discussed in the opinion of the court); Sakamoto v. Duty Free Shoppers, 764 F.2d 1285, 1288 (9th Cir. 1985) (same).

The Army's reliance on Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981), is also misplaced. In Beller, our court reserved two distinct equal protection questions: first, whether the challenged regulations penalizing homosexual conduct burdened the exercise of a fundamental or important substantive right to engage in certain conduct; second, whether the challenged regulations discriminated against a suspect or quasi-suspect class. As explained below, in

Hatheway we clearly answered the first of these discret equal protection questions. The Army argues, however that Hatheway also decided the second question reserved in Beller – the question raised in Watkins' claim – whethe homosexuals constitute a suspect or quasi-suspect class.[2]

Hatheway, a soldier convicted of committing sodomy in violation of 10 U.S.C. 925, claimed that the Army was prosecuting cases involving homosexual sodomy while refusing to prosecute cases involving heterosexual sodomy. Our court "understood Hatheway's claim (that the commission of a homosexual act is an impermissible basis for prosecution) to be an equal protection argument," Hatheway, 641 F.2d at 1382, which we treated as resting on the branch of equal protection doctrine concerned with whether a governmental classification burdens a fundamental or important substantive right to engage in certain conduct. Thus, we explicitly characterized Hatheway's claim "that the commission of a nonsexual act is an impermissible basis for prosecution" to be the sort of equal protection claim that "implicate[d] the 'right to be free . . . from unwarranted intrusions into one's privacy.' " 641 F.2d at 1382 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). We then reasoned that the interest at stake in Hatheway was similar to the substantive interest at stake in Beller. 641 F.2d at 1382. Because in Beller we decided that under the due process clause the right to engage in homosexual conduct merited "heightened solicitude," but not strict scrutiny, in Hatheway we

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[23] Under equal protection doctrine, heightened scrutiny not only applies to legal classifications that burden suspect or quasi-suspect classes but also applies to classifications that burden the exercise of fundamental or important substantive rights to engage in certain conduct. See, e.g., Plyler v. Doe, 457 U.S. 202, 216-17 & nn.14-15 (1982); Maher v. Roe, 432 U.S. 464, 470-78 (1977); L. Tribe, American Constitutional Law 16-7, at 1002-03, 16-31, at 1089-90 & n.1 (1978).

adopted this assessment for the purposes of our fundamental rights equal protection analysis. Accordingly, we applied intermediate scrutiny to the Army's actions and held that "the selection of cases involving homosexual acts for Article 125 prosecutions" was permissible because such prosecutions bore "a substantial relationship to an important government interest." Id. Thus, we rejected Hatheway's claim based on an analysis of the fundamental rights branch of equal protection doctrine, the branch of equal protection doctrine upon which Watkins does not rely.

The Army argues that Hatheway should nonetheless be read as having decided the suspect class question. In support of this argument, the Army relies upon a single sentence in a footnote—the opinion's only reference to suspect class analysis. In footnote 6 we wrote: "Though '[t]he courts have not designated homosexuals a "suspect" or "quasi-suspect" classification so as to require more exacting scrutiny,' DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979), heightened scrutiny is independently required where a classification penalizes the exercise of a fundamental right. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969)." 641 F.2d at 1382 n.6. Although I recognize that the intended purpose of this footnote is not entirely clear, I cannot fairly read this passing reference as an adjudication of the important and unresolved constitutional question whether homosexuals constitute a suspect or quasi-suspect class for the purpose of equal protection analysis. Rather, I read footnote 6 as simply clarifying the distinction between the suspect class and fundamental rights branches of equal protection doctrine while acknowledging that at the time of the Hatheway decision courts had not yet decided whether homosexuals constitute a suspect or quasi-suspect class. That the critical language in footnote 6 is taken directly from our opinion in DeSantis, 608 F.2d at 327, informs our

reading. In DeSantis, we acknowledged that our court had not yet designated homosexuals as a suspect or quasi-suspect class, but we did not decide that homosexuals should not be so designated. See infra at 30-31. Similarly, in footnote 6 of Hatheway, we remarked on the existing state of the law with respect to homosexuals without deciding the open question whether homosexuals constitute a suspect or quasi-suspect class. In other words, I read Hatheway as interpreting the equal protection claim presented as resting solely on the fundamental rights branch of equal protection analysis. Hatheway is also distinguishable from this case because, like both Hardwick and Beller, Hatheway involved a classification based on homosexual conduct, not homosexual orientation. As I note throughout my opinion, this distinction is relevant to an analysis of Watkins' particular equal protection claim.

Because I read Hatheway as not deciding the suspect class issue, and because the suspect class and fundamental rights branches of equal protection doctrine involve very separate inquiries, see, e.g., San Antonio School Indep. District v. Rodriguez, 411 U.S. 1, 18-39 (1973); Perry, Modern Equal Protection, 79 Colum. L. Rev. 1023, 1074-83 (1979); Developments in the Law – Equal Protection, 82 Harv. L. Rev. 1065, 1087-1131 (1969), Hatheway does not stand in the way of Watkins' equal protection claim.[24]

Finally, I must reject the Army's contention that in DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), our court held that homosexuals do not constitute a suspect or quasi-suspect class. In DeSantis, we considered whether homosexuals were a protected class within the meaning of 42 U.S.C. 1985(3), which secures a right of

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[24] If Hatheway had decided that homosexuals do not constitute a suspect class, I would vote to have this en banc panel overrule it.

action against private parties who conspire to deprive "any person or class of persons of the equal protection of the laws." We held that section 1985(3) protects only those groups that have been previously determined by Congress or the courts to need special Federal assistance in protecting their civil rights. 608 F.2d at 333.[25] Applying this standard, we concluded that homosexuals could not receive the protection of section 1985(3), in part because "[t]he courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification," 608 F.2d at 333 (emphasis added). We did not, and did not need to, consider whether homosexuals should be considered a suspect class. Thus, our decision that section 1985(3) did not protect homosexuals turned simply on the point that courts had not yet designated homosexuals a suspect class. Although DeSantis does not articulate the reasons that section 1985(3) requires a prior governmental determination, it seems likely – since section 1985(3) authorizes suits against private individuals and requires no state action – that our court's interpretation of the statute was animated by concerns about providing potential defendants with sufficient notice of the statute's scope. Cf. Marks v. United States, 430 U.S. 188, 192 (1977) (judicial enlargement of the scope of criminal statute without fair notice violates due process).

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[25] Along with subsequent cases, DeSantis has established that there are only two ways of making this showing under 1985(3): (1) proving that Congress has enacted statutes offering special protection to the class; or (2) proving that courts have offered special protection to the class by designating it a suspect or quasi-suspect class. Id., see also Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985).

C

While neither the Supreme Court nor the Ninth Circuit has decided the question presented in Watkins' appeal—whether persons of homosexual orientation constitute a suspect class under equal protection doctrine—several other circuits have considered the different but related question whether laws burdening the class of individuals engaging in homosexual conduct trigger heightened scrutiny under the equal protection clause. Only one circuit, however, has given the issue more than cursory treatment.[26] In Padula v. Webster, 882 F.2d 97 (D.C. Cir. 1987), the District of Columbia Circuit rejected an equal protection challenge to the FBI's policy of discriminating against "practicing homosexuals" in its hiring decisions. The D.C. Circuit did not analyze whether the class of persons engaging in homosexual conduct satisfies the tradi-

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[26] The Fifth and Tenth circuits have also considered this question. Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), (stressing that statute at issue was "directed at certain conduct, not at a class of people"), cert. denied, 478 U.S. 1022 (1986); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) (statute at issue proscribes "public homosexual activity" by teachers), aff'd without opinion by an equally divided Court, 470 U.S. 903 (1985). Both of these circuits held that discrimination based on homosexual conduct does not merit heightened scrutiny under the equal protection clause, but neither circuit attempted any serious analysis of the issue. See Baker v. Wade, 769 F.2d at 292 (noting merely that the plaintiff "has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification"); National Gay Task Force, 729 F.2d at 1273 (stating summarily that classification based on choice of sexual partners could not be suspect because Supreme Court has not held gender to be a suspect classification); see also Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (citing without explanation National Gay Task Force, Hatheway, and DeSantis for the proposition that a "classification based on one's choice of sexual partners is not suspect").

tional indicia of suspectness, see infra at 33-44, but rather concluded summarily (as the Army urges us to do here) that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." Id. at 103. The D.C. Circuit reasoned that "[i]f the [Supreme] Court [in Hardwick] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." Id.

Padula's reasoning rests on the false premise that Hardwick issues a blanket approval for discrimination against homosexuals. To repeat what I said above, Hardwick held only that the constitutionally protected right to privacy does not extend to homosexual sodomy. The case had nothing to do with equal protection. I see no principled way to transmogrify the Court's holding that the due process clause permits states to criminalize specific sexual conduct commonly engaged in by homosexuals into a holding that the equal protection clause gives states a license to pass "homosexual laws"—laws imposing special restrictions on gays because they are gay. Thus, I find Padula unpersuasive. Moreover, as I have reiterated thoughout this opinion, the regulations at issue here target orientation, not conduct—the trait at issue in Padula.

In sum, no federal appellate court[27] has decided the critical issue raised by Watkins' claim: whether persons of homosexual orientation constitute a suspect class under equal protection doctrine. To be sure, Hardwick forecloses Watkins from making a due process claim that the

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[27] One district court has decided the question. See supra n.10.

Army's regulations impinge on an asserted fundamental right to engage in homosexual sodomy. But Watkins makes no such claim. Rather, he claims only that the Army's regulations discriminate against him because of his membership in a disfavored group—homosexuals. This claim is not barred by precedent.

IV

I now address the merits of Watkins' argument that the Army's regulations must be subjected to strict scrutiny because homosexuals constitute a suspect class under equal protection jurisprudence. The Supreme Court has identified several factors that guide our suspect class inquiry. I now turn to each of these factors.

The first factor the Supreme Court generally considers is whether the group at issue has suffered a history of purposeful discrimination. See, e.g., Cleburne, 473 U.S. at 441; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Rodriguez, 411 U.S. at 28; Frontiero, 411 U.S. at 684-85 (plurality). As the Army concedes,[28] it is indisputable that "homosexuals have historically been the object of pernicious and sustained hostility." Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.). Recently courts have echoed the same harsh truth: "Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society." High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361, 1369 (1987) (invalidating Defense Department practice of subjecting gay security clearance applicants to more exacting scrutiny than heterosexual applicants); see also BenShalom v. Secretary of the Army, No. 88-C-468

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[28] See Army's Second Supplemental Brief at 10.

(Jan. 10, 1989) (LEXIS, U.S. Dist. 1989) (homosexuals historically subject to discrimination).

Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches. See generally Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. Cal. L. Rev. 797, 824-25 (1984) (documenting the history of discrimination). Moreover, reports of violence against homosexuals have become commonplace in our society. In sum, the discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin. See, e.g., Cleburne, 473 U.S. at 440 (identifying suspect groups).

The second factor that the Supreme Court considers in suspect class analysis is difficult to capsulize and may in fact represent a cluster of factors grouped around a central idea – whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it "invidious." Consideration of this additional factor makes sense. After all, discrimination exists against some groups because the animus is warranted – no one could seriously argue that burglars form a suspect class. See Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1075 (1980); Note, supra, at 814-815 & nn.115-116. In giving content to this concept of gross unfairness, the Court has considered (1) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society," Frontiero, 411 U.S. at 686 (plurality); (2) whether the class has been sad-

dled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable. See Cleburne, 473 U.S. at 440-44; Plyler, 457 U.S. at 216 n.14, 219 n.19, 220, 223; Murgia, 427 U.S. at 313; Frontiero, 411 U.S. at 685-687 (plurality). I consider these questions in turn.

Sexual orientation plainly has no relevance to a person's "ability to perform or contribute to society." Sergeant Watkins' exemplary record of military service stands as a testament to quite the opposite. Moreover, as the Army itself concluded, there is not a scintilla of evidence that Watkins' avowed homosexuality "had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." ER at 26c.

This irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes—the second indicium of a classification's gross unfairness. See Cleburne, 473 U.S. at 440-441. I agree with Justice Brennan that "discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.' " Rowland, 470 U.S. at 1014 (Brennan, J., dissenting from denial of cert.) (quoting Plyler, 457 U.S. at 216 n.14).

The Army suggests that the opprobrium directed towards gays does not constitute prejudice in the pejorative sense of the word, but rather is simply appropriate public disapproval of persons who engage in immoral behavior. The Army equates homosexuals with sodomists and justifies its regulations as simply reflecting a rational bias against a class of persons who engage in criminal acts of sodomy. In essence, the Army argues that homosexuals, like burglars, cannot form a suspect class because they are criminals.

The Army's argument rests on two false premises. First, as I have noted throughout this opinion, the class burdened by the regulations at issue in this case is defined by the sexual orientation of its members, not by their sexual conduct. See supra at 4-12. To my knowledge, homosexual orientation itself has never been criminalized in this country. Moreover, any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems. See generally Robinson v. California, 370 U.S. 660 (1962).

Second, little of the homosexual conduct covered by the regulations is criminal. The regulations reach many forms of homosexual conduct other than sodomy such as kissing, handholding, caressing, and hand-genital contact. Yet, sodomy is the only consensual adult sexual conduct that Congress has criminalized, 10 U.S.C. 925. Indeed, the Army points to no law, federal or state, which criminalizes any form of private consensual homosexual behavior other than sodomy. The Army's argument that its regulations merely ban a class of criminals might be relevant, although not necessarily persuasive, if the class at issue were limited to sodomists. But the class banned from Army service is not comprised of sodomists, or even of homosexual sodomists; the class is comprised of persons of homosexual orientation whether or not they have engaged in sodomy.

Finally, I turn to immutability as an indicator of gross unfairness. The Supreme Court has never held that only classes with immutable traits can be deemed suspect. Cf., e.g., Cleburne, 473 U.S. at 442 n.10 (casting doubt on immutability theory); id. at 440-441 (stating the defining characteristics of suspect classes without mentioning immutability); Murgia, 427 U.S. at 313 (same); Rodriguez, 411 U.S. at 28 (same). I nonetheless consider immutability because the Supreme Court has often focused on im-

mutability, see, e.g., Plyler, 457 U.S. at 220; Frontiero, 411 U.S. at 686 (plurality), and has sometimes described the recognized suspect classes as having immutable traits, see, e.g., Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion) (describing race, national origin, alienage, illegitimacy, and gender as immutable).

It is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes "pass" for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. See J. Griffin, Black Like Me (1977). At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, "immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment. See Tribe, supra, at 1073-74 n.52. See generally Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1303 (arguing that the ability to change a trait is not as important as whether the trait is a "determinative feature of personality").

With these principles in mind, I have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largley impervious to change. See Note, supra, 57 S. Cal. L. Rev. at 817-821 (collecting sources); see also L. Tribe, supra note 23, at 945 n.17. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. Would heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. See L. Tribe, supra note 23, at 945 n.17. But see Note, supra, 57 S. Cal. L. Rev. at 820-21 & nn.147-149. But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes. To express the same idea under the alternative formulation, I conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.

The final factor the Supreme Court considers in suspect class analysis is whether the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government. See, e.g., Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 216 n.14; Rodriguez, 411 U.S. at 28. Courts are understandably reluctant to extend heightened protection under

equal protection doctrine to groups fully capable of securing their rights through the political process. It cannot be seriously disputed, however, that homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches.

The very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government. In addition, homosexuals as a group are handicapped by structural barriers that operate to make effective political participation unlikely if not impossible. First, the social, economic, and political pressures to conceal one's homosexuality operate to discourage gays from openly protesting anti-homosexual government action. Ironically, by "coming out of the closet" to protest against discriminatory legislation and practices, homosexuals expose themselves to the very discrimination they seek to eliminate. As a result, the voices of many homosexuals are not even heard, let alone counted. Cf. J. Ely, supra note 21, at 163-64. "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." Rowland, 470 U.S. at 1014 (Brennan, J., dissenting from denial of cert.).

Even when gays do come out of the closet to participate openly in politics, the general animus towards homosexuality may render this participation ineffective. Many heterosexuals, including elected officials, find it difficult to empathize with and take seriously the arguments advanced by homosexuals, in large part because of the lack of meaningful interaction between the heterosexual majority and the homosexual minority. Most people have little exposure to gays, both because they rarely encounter

gays[29] and because—as I noted above—homosexuals are often pressured into concealing their sexual identity. Thus, elected officials sensitive to public prejudice and ignorance, and insensitive to the needs of the homosexual constituency, may refuse to even consider legislation that even appears to be pro-homosexual. See Note, supra, 98 Harv. L. Rev. at 1304 n.96. Indeed, the Army itself argues that its regulations are justified by the need to "maintain the public acceptability of military service," AR 635-200, 15-2(a), because "toleration of homosexual conduct . . . might be understood as tacit approval" and "the existence of homosexual units might well be a source of ridicule and notoriety." Army's Opening Brief at 17, 19 n.9, 30-31 n.18. These barriers to the exercise of political power both reinforce and are reinforced by the underrepresentation of avowed homosexuals in the decisionmaking bodies of government and the inability of homosexuals to prevent legislation hostile to their group interests.[30] See Frontiero,

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[29] Because homosexuals are a minority and are frequently excluded from jobs, schools, churches, and heterosexual social circles, see supra, heterosexuals generally have relatively few opportunities to meet homosexuals and overcome their stereotypical thinking about homosexuality.

[30] The Army claims that homosexuals cannot be politically powerless because two states, Wisconsin and California, have passed statutes prohibiting discrimination against homosexuals. Two state statutes do not overcome the long and extensive history of laws discriminating against homosexuals in all fifty states. See, e.g., Note, supra, 57 S. Cal. L. Rev. at 803-07. Moreover, at the national level—the relevant political level for seeking protection from military discrimination—homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination.

The Army also argues that the repeal of sodomy statutes by many states proves that homosexuals are not politically powerless. However, sodomy statutes restrict the sexual freedom of heterosexuals as well as homosexuals. The repeal of sodomy statutes may thus

411 U.S. at 686 & n.17 (plurality) (underrepresentation of women in government caused in part by history of discrimination); Cleburne, 473 U.S. at 445 (reasoning that the existence of legislation responsive to the needs of the mentally disabled belied the claim that they were politically powerless).

In sum, all of the relevant factors drive me to the conclusion that homosexuals constitute a suspect class for equal protection purposes. Moreover, the principles that animate equal protection doctrine—the principles that gave rise to these factors in the first place—reinforce that conclusion. See also J. Ely, supra note 21, at 162-64 (classifications based on homosexuality merit heightened scrutiny); L. Tribe, supra note 23, at 944-45 n.17 (same).

V

Having concluded that homosexuals constitute a suspect class, I now must subject the Army's regulations facially discriminating against homosexuals to strict scrutiny. Consequently, I may uphold the regulations only if they are " 'necessary to promote a compelling governmental interest.' " Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (quoting Shapiro, 394 U.S. at 634); see also University of Calif. Regents v. Bakke, 438 U.S. 265, 357 (1978) (Opinion of Brennan, White, Marshall & Blackmun, JJ.). The requirement of necessity means that no less restrictive alternative is available to promote the compelling governmental interest. See Dunn, 405 U.S. at 343; Bakke, 438 U.S. at 357 (Opinion of four justices).

I recognize that even under strict scrutiny, my review of military regulations must be more deferential than comparable review of laws governing civilians. See Goldman

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reflect the liberalization of attitudes about heterosexual behavior more than it reflects the political power of homosexuals.

v. Weinberger, 106 S. Ct. 1310, 1313 (1986). While the Supreme Court does not "purport to apply a different equal protection test because of the military context, [it does] stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance." Rostker v. Goldberg, 453 U.S. 57, 71 (1981) (citing Schlesinger v. Ballard, 419 U.S. 498 (1975)). I question whether this special deference is appropriate in Watkins' case given that Congress has chosen not to regulate homosexuality or any form of sexual conduct engaged in by military personnel save for one exception — Congress has chosen to criminalize sodomy by military personnel whether committed "with another person of the same or opposite sex." 10 U.S.C. 925 (emphasis added). Hence, if anything, section 925 reflects an absence of congressional intent to discriminate on the basis of sexual orientation.

In any case, even granting special deference to the policy choices of the military, I must reject many of the Army's asserted justifications because they illegitimately cater to private biases. For example, the Army argues that it has a valid interest in maintaining morale and discipline by avoiding hostilities and " 'tensions between known homosexuals and other members [of the armed services] who despise/detest homosexuality.' " Army's Opening Brief at 17 (quoting and incorporating into their argument Beller, 632 F.2d at 811); see also id. at 17-18, 19 n.9, 30, 30-31 n.18; Army's Second Supp. Brief at 30-31 & n.17; AR 635-200, 15-1(a).[31] The Army also expresses its

[31] A somewhat different rationale conceivably could also underlie certain cryptic statements the Army makes about its concerns regarding "close conditions affording minimal privacy," " 'potential for difficulties arising out of possible close confinement,' " and "the intimacy of barrack's life." AR 635-200, 15-1(a); Army's Opening Brief

" 'doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands' " because many lower-ranked heterosexual soldiers despise and detest homosexuality. See Army's Second Supp. Brief at 30-31 (quoting and incorporation Beller, 632 F.2d at 811); see also id. at 31 n.17; Army's Opening Brief at 17-18, 19 n.9, 30; AR 635-200, 15-1(a). Finally, the Army argues that the presence of gays in its ranks "might well be a source of ridicule and notoriety, harmful to the Army's recruitment efforts" and to its public image. Army's Opening Brief at 31 n.18; see also id. at 15, 17, 19 n.9, 30; AR 635-200, 15-1(a).

These concerns strike an all-too-familiar chord. For much of our history, the military's fear of racial tension kept black soldiers separated from whites. As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks

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at 15 (quoting Beller, 632 F.2d at 812); Army's Second Supp. Brief at 19 n.9, 30. Conceivably, the Army could be concerned in part that the presence of gays in the ranks will create sexual tensions—as distinguished from tensions arising from prejudice—because of the practical necessity of housing gays with personnel of the same sex. The Army, however, never articulates this concern. Thus it gives no indication that it regards this concern as compelling or that it believes that weeding all homosexuals out of the military—even soldiers as exemplary as Sergeant Watkins—is necessary to advance a compelling military interest in reducing sexual tensions. Indeed, at points in its argument the Army implies that it is concerned about the close confinement of soldiers only insofar as such confinement might exacerbate hostilities and tensions assertedly created by the prejudice some heterosexuals have against homosexuals. See Army's Opening Brief at 17, 31 n.18. Even if the Army had raised the argument that excluding homosexuals from barracks reduces sexual tension and had shown that reducing sexual tension serves a compelling interest, nothing in the record even suggests that a per se rule banning all homosexuals from the Army would be the least restrictive method of advancing this interest.

kept black soldiers separated from whites. As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale. See B. Ware, William Hastie: Grace Under Pressure 99, 134 (1984).[32] Today, if is unthinkable that the judiciary would defer to the Army's prior "professional" judgment that black and white soldiers had to be segregated to avoid interracial tensions. Indeed, the Supreme Court has decisively rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those private prejudices create real and legitimate problems. See Palmore V. Sidote, 466 U.S. 429 (1984).

In Palmore, a state granted custody of a child to her father because her white mother had remarried a black man. The state rested its decision on the best interests of the child, reasoning that, despite improvements in race relations, the social reality was that the child would likely suffer social stigmatization if she had parents of different races. A unanimous Court, in an opinion by Chief Justice Burger, conceded the importance of the state's interest in the welfare of the child, but nonetheless reversed with the following reasoning:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. . . . The question, however, is whether the reality of

[32] It took an Executive Order in 1945 by President Truman, issued against the advice of almost every admiral and general, to integrate our armed forces. M. Miller, Plain Speaking: An Oral Biography of Harry S. Truman 79 (1983). It is also interesting to note that during World War II the Army deliberately minimized any publicity about the existence of black soldiers because it feared that such publicity would tarnish the Army's public image. See G. Ware, supra, at 100.

> private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. at 433. Thus, Palmore forecloses the Army from justifying its ban on homosexuals on the ground that private prejudice against homosexuals would somehow undermine the strength of our armed forces if homosexuals were permitted to serve. See also Cleburne, 473 U.S. at 448 (even under rationality review of discrimination against group that is neither suspect nor quasi-suspect, catering to private prejudice is not a cognizable state interest).

The Army's defense of its regulations however, goes beyond its professed fear of prejudice in the ranks. Apparently, the Army believes that its regulations rooting out persons with certain sexual tendencies are not merely a response to prejudice, but are also grounded in legitimate moral norms. In other words, the Army believes that its ban against homosexuals simply codifies society's moral consensus that homosexuality is evil. Yet, even accepting arguendo this proposition that anti-homosexual animus is grounded in morality (as opposed to prejudice masking as morality), and assuming further that the Army is an appropriate governmental body to articulate moral norms, equal protection doctrine does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against suspect classes.

A similar principle animates Loving V. Virginia, 388 U.S. 1 (1967), in which the supreme Court struck down a

Virginia statute outlawing marriages between whites and blacks. Although the Virginia legislature may have adopted this law in the sincere belief that miscegenation—the mixing of racial blood lines—was evil,[33] this moral judgment could not justify the statute's discrimination on the basis of race. Like the Army's regulations proscribing sexual acts only when committed by homosexual couples, the Virginia statute proscribed marriage only when undertaken by mixed-race couples. In both cases, the government did not prohibit certain conduct, it prohibited certain conduct selectively—only when engaged in by certain classes of people. Although courts may sometimes have to accept society's moral condemnation as a justification even when the morally condemned activity causes no harm to interests outside notions of morality, see Hardwick, 478 U.S. at 196 (accepting moral condemnation as justification under rationality review), our deference to majoritarian notions of morality must be tempered by the equal protection principles which require that those notions be applied evenhandedly. Laws that limit the acceptable focus of one's sexual desires to members of the opposite sex, like laws that limit one's choice of spouse (or sexual partner) to members of the same race, cannot withstand constitutional scrutiny absent a compelling governmental justification. This requirement would be reduced to a nullity if the government's assertion of moral objections only to interracial couples or only to

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[33] Indeed, the trial judge in Loving admonished Mildred and Richard Loving that interracial marriage was a violation of the Christian ethnic of racial purity: "Almighty God created the races, white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." Loving, 388 U.S. at 3.

homosexual couples could itself serve as a tautological basis for the challenged classification.

The Army's remaining justifications for discriminating against homosexuals may not be illegitimate, but they bear little relation to the regulations at issue. For example, the Army argues that military discipline might be undermined if emotional relationships developed between homosexuals of different military rank. Army's Opening Brief at 17-18, 19 n.9, 30; AR 635-200, 15-1(a). Although this concern might be a compelling and legitimate military interest, the Army's regulations are poorly tailored to advance that interest. No one would suggest that heterosexuals are any less likely to develop emotional attachments within military ranks than homosexuals. Yet the Army's regulations do not address the problem of emotional attachments between male and female personnel, which presumably subjects military dicipline to similar stress. Surely, the Army's interest in preventing emotional relationships that could erode military discipline would be advanced much more directly by a ban on all sexual contact between members of the same unit, whether between persons of the same or opposite sex. Cf. Cleburne, 473 U.S. at 449-50 (refecting certain asserted justifications under rationality review where the justification would extend to other groups but the challenged classifications did not). Here the Army's regulations disqualify all homosexuals whether or not they have developed any emotional or sexual relationships with other soldiers.

Also bearing little relation to the regulations is the Army's professed concern with breaches of security. AR 635-200, 15-1(a). Certainly the Army has a compelling interest in excluding persons who may be susceptible to blackmail. It ;is evident, however, that homosexuality poses a special risk of blackmail only if a homosexual is secretive about his or her sexual orientation. The Army's

regulations do nothing to lessen this problem. Quite the opposite, the regulations ban homosexuals only after they have declared their homosexuality or have engaged in known homosexual acts. The Army's concern about security risks among gays could be addressed in a more sensible and less restrictive manner by adopting a regulation banning only those gays who had lied about or failed to admit their sexual orientation.[34] In that way, the Army would encourage, rather than discourage, declarations of homosexuality, thereby reducing the number of closet homosexuals who might indeed pose a security risk. Moreover, even if banning homosexuals could lessen security risks, there appears to be no reason for treating homosexuality as a nonwaivable disqualification from military service while treating other more serious potential sources of blackmail as waivable disqualifications. See AR 635-200, 14-12(c) & (d) (making drug abuse and the commission of other serious military offenses waivable disqualifications).

CONCLUSION

The Army's regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation, a suspect class, and because the regulations are not necessary to promote a legitimate compelling governmental interest. I would thus reverse the district court's rulings denying Watkins' motion for summary judgment and granting summary judgment in favor of the Army, and re-

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[34] Watkins has forthrightly reported his homosexuality since his induction in 1967, and his homosexuality was always a matter of common knowledge. There is no suggest in the record before us that Watkins ever feared public disclosure of his homosexuality.

mand with instructions to enter a declaratory judgment that the Army Regulations A.R. 635-200, Chapter 15, and 601-280, 2-21(c), are constitutionally void on their face, and to enter an injunction requiring the Army to consider Watkins' reenlistment application without regard to his sexual orientation.

CYNTHIA HOLCOMB HALL, Circuit Judge, dissenting.

Sergeant Perry Watkins has proven himself to be a loyal, talented, and honest soldier. The majority is rightly impressed by Watkins' uniformly outstanding performance evaluations and the persistent efforts of his immediate superiors to insure his continued advancement in the United States Army. I share the majority's admiration of Watkins' fine service to his country. Watkins' record has but one blemish under Army regulations: his homosexuality. Watkins brought this lawsuit seeking to enjoin the Army from considering his homosexuality in passing upon the merits of his reenlistment application.

During Watkins' tenure, Army regulations have always precluded the enlistment of homosexuals. The gravamen of Watkins' claim is that such discrimination against homosexuals constitutes a violation of his right to equal protection under the fifth amendment. The en banc majority shies away from this issue, however, and grants Watkins the relief he seeks on an alternative rationale.[1]

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[1] A majority of the active judges on this court voted to consider en banc whether equal protection doctrine prohibits the Army's discrimination against homosexuals. While I do not dispute the court's en banc power to address the equitable estoppel claim, I do not interpret the court's decision to do so as meaning that the Watkins I decision conflicts with prior decisions of this court. Watkins argues that Watkins I conflicts with three Ninth Circuit decisions. His contention is frivolous. In Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981), the court rejected on the merits an Army reservist's argument that the Army Reserve was equitably estopped from enforcing an age-based years of-service limitation. As the justiciability issue was neither raised nor addressed, Lavin is of no precedential value on this point. Neither is Watkins I in conflict with Jablon v. United States, 657 F.2d 1064 (9th Cir. 1981). Jablon held that the government had not waived its sovereign immunity with regard to a promissory estoppel claim by a service member. How this case advances Watkins' argument is incomprehensible. Finally, Watkins is wrong in arguing that Watkins I con-

The majority holds that the Army is equitably estopped from refusing to reenlist him due to the Army's long-standing knowledge of his homosexuality. I dissent from this holding as an unwarranted application of common law principles to matters within the military's expertise.

I

The original panel in this case held that courts should not review internal military affairs absent "an allegation of the deprivation of a constitutional right or an allegation that the military has acted in violation of applicable statutes or its own regulations." Watkins v. United States Army, 721 F.2d 687, 690 (9th Cir. 1983) ("Watkins I"). The Watkins I court took this prerequisite to judicial review of internal military decision verbatim from the test set forth in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), for determining the justiciability[2] of claims concerning internal military affairs.

The first prong of the Mindes test requires "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion

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flicts with Cortese v. United States, 782 F.2d 845 (9th Cir. 1986). As the Army notes, the plaintiff in that case was a private contractor, so it did not raise the military discipline concerns at the heart of the justiciability doctrine. The Mindes doctrine does not present an obstacle to civilian claims against the military. Bledsoe v. Webb, 839 F.2d 1357, 1359 (9th Cir. 1988).

[2] The Mindes doctrine is analogous to the political question doctrine in limiting the types of disputes which courts are competent to resolve. See Khalsa v. Weinberger, 779 F.2d 1393, 1395 n.1 (9th Cir.), prior judgment reaff'd, 787 F.2d 1288 (9th Cir. 1985). Consequently, the doctrine refers "to 'reviewability' rather than to 'subject matter jurisdiction.'" Id. at 1396 n.2. This dissent will use the term "justiciability" synonomously with "reviewability."

of available intraservice corrective measures." Mindes, 453 F.2d at 201. If these prerequisites are met, a court proceeds to the second prong, which requires weighing four factors.[3] Most circuits have adopted the Fifth Circuit's Mindes test.[4] Furthermore, Mindes is well-established in the Ninth Circuit.[5]

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[3] The factors weighed in the second prong include: the nature and strength of plaintiff's claim; the potential injury to plaintiff' the type and degree of anticipated interference with the military function; and the level of military expertise and discretion. As Watkins' equitable estoppel claim fails to satisfy the first prong of the Mindes test, the dissent does not analyze these four factors. In addition, this case does not require us to decide whether the cases rejecting constitutional claims under Mindes' second prong do so on the merits or on a justiciability basis. Compare Khalsa, 779 F.2d at 1400 (rejecting suit bring first amendment challenge to Army appearance regulations under Mindes' second prong), with Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (rejecting suit bringing first amendment challenge to Air Force's appearance regulations on the merits).

[4] See, e.g., Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987) (per curiam); Stinson v. Hornsby, 821 F.2d 1537, 1540 (11th Cir. 1987), cert. denied, 109 S. Ct. 402 (1988); Williams v. Wilson, 762 F.2d 357, 359 (4th Cir. 1985); Ogden v. United States, 758 F.2d 1168, 1179 n.7 (7th Cir. 1985); Penagaricano v. Llenza, 747 F.2d 55, 60-61 (1st Cir. 1984); Nieszner v. Mark, 684 F.2d 562, 564 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); cf. Bois v. Marsh, 801 F.2d 462, 468 (D.C. Cir. 1986); Schultz v. Wellman, 717 F.2d 301, 306-07 (6th Cir. 1983); Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976). But see Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981).

[5] Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437, 1440-45 (9th Cir. 1988); Sandidge v. State of Wash., 813 F.2d 1025, 1026 (9th Cir. 1987); Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986); Khalsa, 779 F.2d at 1398; Gonzalez v. Department of Army, 718 F.2d 926, 929 (9th Cir. 1983); Wallace v. Chappell, 661 F.2d 729, 732-33 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983); Schlanger v. United States, 586 F.2d 667, 671 (9th Cir. 1978), cert. denied, 441 U.S. 943 (1979).

In a straightforward application of Mindes' first prong, the Watkins I panel found a claim of equitable estoppel to be nonjusticiable because this type of common law claim is not premised on the deprivation of constitutional rights or the violation of applicable statutes or regulations. These prerequisites to judicial scrutiny of military affairs serve to advance a widely recognized goal: minimizing "judicial inquiry into, and hence intrusion upon, military matters." United States v. Stanley, 107 S. Ct. 3054, 3063 (1987). While the majority acknowledges that our cases have accepted the limited nature of judicial regulation of military affairs, it fails to explore how the Mindes prerequisites further this objective. Indeed, the majority does not argue that limiting judicial review to federal constitutional, statutory, and regulatory claims is a bad idea. The majority simply concludes—in ad hoc fashion—that the Mindes prerequisites should be ignored in this case.[6]

II

The Supreme Court held in Feres V. United States, 340 U.S. 135 (1950), that the government has no Federal Tort Claims Act liability for injuries to military service members arising out of or in the course of activity incident to military service. The Court's holding in Feres teaches that these are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59

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[6] It is ironic that the majority concludes that it "must determine the preliminary question whether Watkins has exhausted available intraservice remedies." Opinion at 100. Exhaustion of intraservice remedies is, of course, the other half of Mindes' first prong. As with the limitation to federal claims, exhaustion serves to limit judicial interference with military matters.

(1985). "Feres seems to be best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline. . . .' " United States v. Muniz, 374 U.S. 150, 162 (1963) (quoting United States v. Brown, 348 U.S. 110, 112 (1954)).

The Court recently has held that the military discipline rationale of the Feres doctrine precludes a tort action by a military service member even when a civilian government employee is alleged to be the tortfeasor. United States v. Johnson, 107 S. Ct. 2063 (1987). The Court emphasized that "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country." Id. at 2069. The Court concluded that the mere pendency of a suit against the government by a service member "could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." Id. While the suit before the Court involved service-related injuries, the Court's reasoning underscores that all suits by active military personnel against the government they serve have the potential to undermine discipline.

The Supreme Court's decision in Chappell v. Wallace, 462 U.S. 296 (1983), relied upon Feres' military discipline rationale to conclude that enlisted military personnel cannot maintain a Bivens[7] suit to recover damages from a superior officer for alleged constitutional violations. In Chappell, five Navy enlisted men alleged that certain officers discriminated against them on the basis of race in making duty assignments and performance evaluations. Id. at 297. But the Court opined that "[c]ivilian courts

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[7] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the very heart of the necessarily unique structure of the Military Establishment." Id. at 300.

While the Court in Chappell identified the officer-subordinate relationship as especially important, the Court also noted that "[i]t is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline . . . ." Id. at 301. This presumption against "congressionally uninvited intrusion into military affairs by the judiciary" explains why the Court has recently expanded upon Chappell to hold that a damages remedy is unavailable even though the defendants were not plaintiff's superior officers and may well have been civilian personnel. Stanley, 107 S. Ct. at 3061, 3063. The Court recognizes that military discipline is adversely affected whenever a service member brings suit in connection with injuries incident to military service.

A

The Court's decision in Chappell reversed the Ninth Circuit's ruling that the Navy men had alleged a sufficient claim for damages. Finding Mindes' first prong satisfied, the Ninth Circuit had remanded the case to the district court for consideration of the second prong of Mindes: the weighing of four factors to determine the case's appropriateness for judicial resolution. Chappell, 661 F.2d at 734. While his circuit expressed some initial uncertainty over the continued efficacy of the Mindes test in the wake

of the Supreme Court's decision in Chappell, courts subsequently have applied the Mindes jurisdictional test to claim not directly precluded by the Supreme Court's Chappell decision.[8]

Broadly speaking, Mindes applies to two types of claims which Chappell does not expressly foreclose: (1) claims strictly seeking injunctive or declaratory relief,[9] and (2) damages claims based upon an explicit statute, such as 42 U.S.C. 1983 or 1985(3).[10] As Watkins' suit solely seeks declaratory and injunctive relief, it does not run afoul of Chappell's express holding.

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[8] In Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), the court found that the "precise holding" of Chappell did not dictate rejection of plaintiff's claim that defendants had violated 42 U.S.C. 1985(1). Plaintiff, a former pilot and officer in the Air Force Reserve, sued commanding officers and attending medical personnel. The court noted that Chappell had merely rejected an implied damages remedy, but that section 1985(1) expressly authorized a damages award. Id. Nonetheless, the court held that plaintiff's section 1985(1) claim was properly dismissed because such liability would conflict with Chappell's underlying rationales. Given this disposition, the court did not address whether Mindes "survived" Chappell. Mollnow, 716 F.2d at 630 n.5.

[9] Chappell noted that service members are not precluded from obtaining any relief whatsoever for constitutional violations, citing to three cases which involved injunctive or declaratory relief. Chappell, 462 U.S. at 304. The Ninth Circuit in Mollnow noted that none of the cited cases was a "suit for damages." Mollnow, 716 F.2d at 629 n.4. The Supreme Court has subsequently acknowledged that these citations "referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." Stanley, 107 S. Ct. at 3063. See Ogden, 758 F.2d at 1175 ("We hold that Chappell does not preclude an equitable remedy").

[10] "[T]he [Chappell] Court's rationale has left the field open for Congress to enact legislation authorizing servicemen's constitutional [damages] claims against their superiors." Christoffersen, 855 F.2d at 1441. As suits against a state's National Guard involve state action,

B

The Court's rejection of a damages remedy against military officials in Chappell, and its implied acceptance of claims seeking only declaratory or injunctive relief, highlight the Court's appreciation of the differing nature of these two types of claims. The Court has held that federal executive officials are entitled to qualified immunity against damages claims because damages threaten to undermine "the vigorous exercise of official authority." Butz v. Economou, 438 U.S. 478, 506 (1978); see also Harlow v. Fitzgerald, 457 U.S. 800 (1982).[11] But an absolute immunity from suits seeking damages "would seriously erode the protection provided by basic constitutional guarantees." Butz, 438 U.S. at 505. Similarly, the availability of certain types of injunctive suits against the

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section 1983 provides a potential basis for a statutory damages claim. The Christoffersen court declined to decide "whether Chappell bars any or all section 1983 claims for alleged civil rights violations by military personnel." Id. This circuit has also left open the question of whether Chappell is inconsistent with a damages suit pursuant to section 1985(3). See Miller v. Newbauer, No. 87-6573, slip op. 14999, 15008 (9th Cir. December 7, 1988).

Other circuits have concluded that Chappell's reasoning is inconsistent with a damages action under section 1983 against state National Guard officials. See Holdiness v. Stroud, 808 F.2d 417, 423 (5th Cir. 1987); Jorden v. National Guard Bureau, 799 F.2d 99, 108 (3d Cir. 1986), cert. denied, 108 S. Ct. 66 (1987); Brown v. United States, 739 F.2d 362, 366-67 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). As Watkins' suit does not raise the question of whether obtaining such damages against state National Guard officers is inconsistent with the Chappell decision's underlying rationales.

[11] Cf. Edelman v. Jordan, 415 U.S. 651 (1974) (interpreting the eleventh amendment as precluding the retroactive award of monetary benefits, while allowing prospective injunctive relief).

military assures "that all individuals, whatever their position in government, are subject to federal law . . . ." Butz, 438 U.S. at 506 (emphasis added).

While suits seeking injunctive relief against military officers are a critical means of assuring the rule of law, claims for injunctive relief do require the courts to second-guess the "considered professional judgment" of military authorities. Goldmen v. Weinberger, 475 U.S. 503, 508 (1986) (rejecting first amendment suit seeking to enjoin the Air Force from enforcing a regulation which prohibited plaintiff from wearing yarmulke). Indeed the Mindes decision itself arose solely in the context of a claim for injunctive and declaratory relief in connection with plaintiff's forced separation from active duty. Mindes, 453 F.2d at 198.

As suits for injunctive relief interfere with the military mission, albeit to a lesser extent than suits seeking damages, Chappell cannot be read as holding that all injunctive suits are equally well-taken. Accordingly, Mindes appropriately limits the types of claims which may be asserted to those raising federal constitutional, statutory or regulatory matters. "However broad a federal court's discretion concerning equitable remedies, it is absoutely clear . . . that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law." Bivens, 403 U.S. at 400 (Harlan, J., concurring) (emphasis added).

For similar reasons, the Supreme Court has declined to erect the eleventh amendment as a complete bar to federal court jurisdiction of claims alleging unconstitutional conduct by a state actor. See Ex Parte Young, 209 U.S. 123 (1908). "[T]he Young doctrine rests on the need to promote the vindication of federal rights." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). "Young's applicability has been tailored to conform as

precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " Papasan v. Allain, 478 U.S. 265, 277 (1986) (quoting Pennhurst, 465 U.S. at 105).

The eleventh amendment analogy is apt because it also requires balancing the need to vindicate federal rights with the obligation not to intrude excessively upon an area presumptively off-limits to the federal courts. A state's "constitutional immunity" can be likened to the military's specialized society separate from civilian society." Compare Pennhurst, 465 U.S. at 105, with Parker v. Levy, 417 U.S. 733, 743 (1974). But in the eleventh amendment area, a state's immunity stands impenetrable where a plaintiff fails to allege that state officials have violated federal law. "A federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law." Pennhurst, 465 U.S at 106. In a like manner, the Mindes test insures that judicial intrusions into military matters are limited to the vindication of federal interests.

C

There is no doubt that the majority's intrusion into military affairs, unjustified by important federal interests, will have a disruptive effect upon military discipline. The Watkins I panel stated that "[i]t is clear that a court using its equitable powers to compel superior officers to disobey regulations at the instance of a subordinate is a serious threat to military discipline." Watkins I, 721 F.2d at 690. The majority attempts to downplay its disruption of military discipline by emphasizing the "stringent requirements that must be satisfied before the government

will be estopped." Opinion at 13-14. But the majority fundamentally fails to understand the nature of military discipline as articulated by the Supreme Court.

As noted above, the Court's decisions in Stanley and Johnson reveal that the mere pendency of a lawsuit by a service member against the government he serves has an adverse impact on military discipline in the "broadest sense of the word." Johnson, 107 S. Ct. at 2069. Stanley cautioned against the dangers of "compelled depositions and trial testimony by military officers concerning the details of their military commands." Stanley, 107 S. Ct. at 3063; see also Khalsa, 779 F.2d at 1395 n.1 (litigation "could interfere with military discipline and efficient operations by requiring superior officers to submit to examinations"). Litigation is inherently disruptive, and entails the risk of "erroneous judicial conclusions (which would becloud military decision-making)." Stanley, 107 S. Ct. at 3063. Litigation has certain "social costs [, which] include the expenses of litigation, [and] the diversion of official energy from pressing public issues . . . ." Harlow, 457 U.S. at 814. Thus, the majority's prediction that the United States military generally will be successful in estoppel suits does not carry the day.

III

The majority fails to marshal any case law in support of its holding that a common law estoppel claim is justiciable against the military. In fact, the majority distorts our prior case law to make it appear as if its holding is uncontroversial. The majority's steadfast desire to avoid constitutional adjudication does not support its destruction of a valuable justiciability doctrine.

A

The majority begrudgingly acknowledges that this court has adopted the Mindes test "in part," citing our decision in Chappell in support of this characterization. Opinion at 12. The court in Chappell did state in a footnote that "[w]e express no view as to whether the Mindes test should govern federal nonconstitutional claims," 661 F.2d at 733 n.5, but this hardly supports minimizing this court's faithfulness to Mindes' first prong.

First, the majority itself concedes that "[s]ome of our cases following Wallace v. Chappell have used language indicating that an internal military decision is reviewable only when the plaintiff alleges a constitutional, statutory, or regulatory violation." Opinion at 12 n.10. In fact, all our cases following Chappell have insisted that plaintiff's claims allege a federal constitutional, statutory, or regulatory violation. Second, the majority takes Chappell's footnote completely out of context. In contest, Chappell's caveat strongly supports the dissent's position.

The Ninth Circuit in Chappell was greatly concerned that unnecessary judicial review of military matters would adversely affect discipline. Consequently, the court did indeed limit its adoption of Mindes' first prong, permitting a narrower group of claims raising only "recognized" constitutional rights. 661 F.2d at 734. In explaining why it limited itself to recognized constitutional claims, the court stated: "We mean only that the allegations must amount to more than a traditional state law claim." Id. (emphasis added). This complete presentation of our decision in Chappell demonstrates that that court's adoption "in part" of Mindes is of no solace to the majority.[12]

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[12] The majority's citation to our decision in Helm v. State of Cal., 722 F.2d 507, 509-10 (9th Cir. 1983), is entirely unpersuasive. The majority cites Helm as having applied the Mindes test to a constitutional

B

The majority states that it eschews the Mindes test in this case because "[s]uch an extension of the Mindes reviewability doctrine to bar equitable relief would improperly require cases against the military to be decided on the broadest possible grounds rather than on the narrowest." Opinion at 13. But the majority's desire to avoid the difficult equal protection question presented in this case is no reason to dispense with well-established case law.

This type of policy concern does not override the established limitations of the federal courts. Plaintiffs in the Pennhurst case similarly argued that the Court's eventual disposition would conflict with "the policy of avoiding unnecessary constitutional decisions . . . ." Pennhurst, 465 U.S. at 121. In that area of the law, the Court held that "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary . . . ." Id. at 123. Likewise, this policy consideration cannot override the established policy against judicial regulation of military matters absent pressing federal interests.

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claim against the military but not to an equitable estoppel claim, the inference apparently being that Helm supports the proposition that Mindes is no bar to an equitable estoppel claim. Helm provides scant support for this proposition. The Helm court noted that the estoppel claim was not properly before it because plaintiff first raised that claim on appeal. Id. at 510. The court did state that "[e]ven had the issue been presented below, it is effectively precluded by Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981)." Id. As noted, supra, note 1, the parties did not raise the Mindes issue in Lavin, and the court did not address it.

IV

The majority's holding on the merits of Watkins' equitable estoppel claim is also entirely unpersuasive. While the Supreme Court has declined to accept a government invitation to adopt a rule that equitable estoppel may never be invoked against the government, Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1979), the Court has yet to uphold even one such claim. Notably, the Court has reversed this court's invocation of equitable estoppel many times, on facts no less sympathetic than Watkins'. See, e.g., INS v. Miranda, 459 U.S. 14, 17-19 (1982) (per curiam) (reversing Ninth Circuit decision equitably estopping INS from denying resident status to alien spouse of citizen when Petitioner became ineligible during INS delay in processing application); INS v. Hibi, 414 U.S. 5 (1973) (per curiam) (reversing Ninth Circuit decision equitably estopping INS from denying citizenship to Filipino war veteran); see also Montana v. Kennedy, 366 U.S. 308, 314-15 (1961) (government not estopped to deny citizenship to child of U.S. citizen born while his mother was living abroad, even though government official advised her that she could not return to the U.S. to have her baby).

The majority's assessment that the Army's treatment of Watkins amounts to "affirmative misconduct" is especially unconvincing and demands refutation. The Supreme Court stated in Heckler that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." 467 U.S. at 60. For this reason, "the Government may not be estopped on the same terms as any other litigant." Id. Accordingly, the courts require that "[a] party seeking to raise estoppel against the government must establish 'affir-

mative misconduct going beyond mere neglegence'. . . ." Wagner v. Director, Federal Emergency Mgmt. Agency, 847 F.2d 515, 519 (9th Cir. 1988) (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)).

The affirmative misconduct prerequisite to governmental estoppel insures that the citizenry's justifiable expectation that the government will enforce the laws uniformly will not be lightly disrupted. The majority fails to appreciate that its failure to give genuine substance to the affirmative misconduct element disrupts this expectation.

The majority concludes that "the Army affirmatively misrepresented in its official records throughout Watkins' fourteen-year military career that he was qualified for reenlistment." Opinion at 16. The misconduct the majority identifies is the Army's failure to enforce its long-standing policy against the enlistment of homosexuals.

The Army's prior practice of excusing Watkins' homosexuality, despite regulations precluding his reenlistment, simply was not affirmative misconduct. Equitable estoppel is triggered by "a definite misrepresentation of fact to another person . . . ." Heckler, 467 U.S. at 59 (quoting the Restatement (Second) of Torts 894 (1) (1979)). In the context of governmental estoppel, therefore, the key issue is whether the government's definite misrepresentation of fact constitutes affirmative misconduct. The term affirmative suggests a distinction between misfeasance and nonfeasance, though these are "slippery terms." Santiago v. Immigration & Naturalization Service, 526 F.2d 488, 493 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976).

The Army's prior leniency and understanding in permitting Watkins to reenlist was not a promise or active representation by the Army that its regulation prohibiting homosexuals was a nullity. At most, the Army's conduct in reenlisting Watkins in the past created, by inference, a

representation that the Army would overlook its regulation as to a particular enlistment period. Such apparent acquiescence or ambivalence does not meet the threshhold level of misfeasance needed to trigger equitable estoppel against the military.

Although the majority strives mightily to distance itself from the facts of Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981), that effort is ultimately unsuccessful. In Lavin, Army Reserve recruiters induced the plaintiff to enlist by emphasizing pension benefits, and the Reserve subsequently "led Lavin to believe he was working toward pension benefits." Id. at 1382. Nevertheless, the court held that the Army was not equitably estopped from enforcing a years-of-service regulation which required Lavin's removal from the service before he was eligible for pension benefits.

In this case, Watkins does not argue that the Army affirmatively informed him that he was not subject to its regulation against the enlistment of homosexuals. As Lavin demonstrates, however, even such a direct misrepresentation can fail to constitute affirmative misconduct. If the word "affirmative" is to have any meaning, the Army must do more than choose not to enforce strictly a regulation on its books.

The majority's confusion over the meaning of "affirmative misconduct" is evident. For example, the majority states that the Army "plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and promoting Watkins." Opinion at 18. Does the majority really mean to suggest that the Army's reenlistment of Watkins was an act of misconduct? Surely not. Finally, the majority fails to assure that Watkins relied to his detriment on all cited acts of affirmative misconduct.[13]

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[13] The majority quite rightly expresses its indignation and outrage at the Army's forged entry on Watkins' 1982 Reenlistement Data

The Lavin decision is also especially instructive as to the reasonableness of Watkins' reliance upon his inferential understanding that his homosexuality would not impede his career in the Army. "Persons dealing with the government are charged with knowing government statutes and regulations, and they assume the risk that government agents may exceed their authority and provide misinformation." Lavin, 644 F.2d at 1383. Watkins simply was not justified in assuming that the Army's decision to accept a particular application for reenlistment would insure such acceptance for all time. New administrations must be allowed to pursue new policies so long as these policies do not run afoul of statutory or constitutional provisions. The majority greatly undermines the prerogative of executive officials to implement new programs and policies.

Finally, the majority concedes that the government may be estopped only where "the public's interest will not suffer undue damage by imposition of the liability." Opinion at 15 (quoting Wagner, 847 F.2d at 519). The majority attempts to finesse this issue by stating that the "harm to the public interest if reenlistment is not prevented is nonexistent. . . . [because] [p]laintiff has demonstrated that he is an excellent soldier." Opinion at 20. In other words, reenlisting Watkins will not harm the public interest because the majority thinks that the Army is better off with Watkins, even though he is a homosexual, than it would be without him.

Card. The card indicated that the Army had informed Watkins of his ineligibility for reenlistment at an interview on July 29, 1981. The interview never occurred. The Army's conduct is inexcusable, but its misconduct in this regard has no causal connection to Watkins' estoppel claim. His claim actually centers on the Army's benign "misconduct" in certifying him qualified for reelistment throughout his career.

The majority does not justify the ability of judges to substitute their assessment of a homosexual's impact on military preparedness for the Army's absent substantial federal interests. Courts are not particularly well-suited to determine whether individual homosexual servicemen bring more to the Army than they take from it. In any event, the majority fails even to undertake this task, relying sole upon the undisputed fact that Watkins is an excellent soldier. The Army has concluded that having homosexual soldiers in the Army, even good soldiers like Watkins, interferes with the Army's mission. The majority does not challenge this assessment.

Furthermore, the majority fails to acknowledge the ramifications of its holding. We simply have no idea how many "known" homosexuals the Army has reenlisted in years past. By ignoring the ablility of other homosexuals to invoke the equitable estoppel rationale advanced by the majority, it greatly minimizes the probable damage to the public interest, as judged by the Army.

This dissent has explored the well-established case law which counsels against unnecessary judicial oversight of and intrusion into military matters. In so doing, I have explained how the Mindes doctrine serves as a necessary and logical way to avoid inappropriate inquiry into matters properly within the military's judgment. In my view, Mindes absolutely forecloses Watkins' claim that the Army is equitably estopped from refusing to reenlist him.

The majority's disposition of Watkins' equitable estoppel claim is essentially unprecedented. The majority's shallow treatment of precedent presents a misleading account of governing law. Finally, an examination of the merits of Watkins' estoppel claim proves that the majority has failed to heed the Supreme Court's admonition that the government is to be estopped only upon a showing of

affirmative misconduct. Based upon the foregoing, I dissent.

Judge Trott concurs in the dissent; Judge Beezer concurs in parts I, II, III, and the first paragraph of part V; Chief Judge Goodwin concurs in parts I and III.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-4006

SERGEANT PERRY J. WATKINS, PLAINTIFF-APPELLANT

v.

UNITED STATES ARMY, ET AL., DEFENDANTS-APPELLEES

Argued and Submitted April 22, 1987
Decided Feb. 10, 1988
As Amended June 8, 1988
Rehearing en banc ordered June 8, 1988*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Before: CANBY, NORRIS and REINHARDT, *Circuit Judges.*

NORRIS, *Circuit Judge*:

In August 1967, at the age of 19, Perry Watkins enlisted in the United States Army. In filling out the Army's pre-induction medical form, he candidly marked "yes" in response to a question whether he had homosexual tendencies. The Army nonetheless considered Watkins "qualified for admission"and inducted him into its ranks. Watkins served fourteen years in the Army, and became, in the words of his commanding officer, "one of our most

respected and trusted soldiers." Excerpt of Record [ER] at 26d.

Even though Watkins' homosexuality was always common knowledge, *Watkins v. United States Army*, 551 F.Supp. 212, 216 (W.D.Wash.1982), the Army has never claimed that his sexual orientation or behavior interfered in any way with military functions.[1] To the contrary, an Army review board found "there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." ER at 26c.

In 1981 the Army promulgated new regulations which mandated the disqualification of all homosexuals from the Army without regard to the length or quality of their military service. Pursuant to these new regulations, the Army notified Watkins that he would be discharged and denied reenlistment because of his homosexuality. In this federal court action, Watkins challenges the Army's actions and new regulations on various statutory and constitutional grounds.

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[1] In this opinion we use the term "sexual orientation" to refer to the orientation of an individual's sexual preference, not to his actual sexual conduct. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the opposite sex have a heterosexual orientation. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the same sex have a homosexual orientation.

In contrast, we use the terms "homosexual conduct" and "homosexual acts" to refer to sexual activity between two members of the same sex whether their orientation are homosexual, heterosexual, or bisexual, and we use the term "heterosexual conduct" and "heterosexual acts" to refer to sexual activity between two members of the opposite sex whether their orientatios are homosexual, heterosexual, or bisexual.

Throughout this opinion, the term "gay" and "homosexual" will be used synonymously to denote persons of homosexual orientation.

I

During Watkins' initial three-year tour of duty, he served in the United States and Korea as a chaplain's assistant, personnel specialist, and company clerk. Even before this tour began, Watkins indicated on his pre-induction medical history form that he had "homosexual tendencies." A year later, in 1968, Watkins signed an affidavit stating that he had been gay from the age of 13 and that, since his enlistment, had engaged in sodomy with two other servicemen, a crime under military law. The Army, which received this affidavit as part of a criminal investigation into Watkins' sexual conduct, dropped the investigation for lack of evidence after the two servicemen whom Watkins had named as his sexual partners denied any sexual involvement with him. Despite repeated investigations of Watkins' sexual behavior after 1968, his 1968 affidavit is the only evidence before this court of Watkins' actual sexual conduct. *See infra* at 1332 & n. 2.

When his first enlistment expired in 1970, Watkins received an honorable discharge. In 1971 he reenlisted for a second three-year term, at which time the Army judged him to be "eligible for reentry on active duty." In 1972 the Army again investigated Watkins for allegedly committing sodomy and again terminated the investigation for insufficient evidence. In 1974 the Army accepted Watkins' application for a six-year reenlistment.

In 1975 the Army convened a board of officers to determine whether Watkins should be discharges because of his homosexual tendencies. On this occasion his commanding officer, Captain Bast, testified that Watkins was "the best clerk I have known," that he did "a fantastic job—excellent," and that Watkins' homosexuality did not affect the company. A sergeant testified that Watkins' homosexuality was well-known but caused no problems and

generated no complaints from other soldiers. The four officers on the board unanimously found that "Watkins is suitable for retention in the military service" and stated, "In view of the findings, the Board recommends that SP5 Perry J. Watkins be retained in the military service because there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance. SP5 Watkins is suited fot duty in administrative positions and progression through Specialist rating." ER at 26c.

In November 1977, the United States Army Artillery Group (the USAAG) granted Watkins a security clearance for information classified as "Secret." His application for a position in the Nuclear Surety Personnel Reliability Program (the PRP), however, was initially rejected because his records—specifically, his own admissions—showed that he had homosexual tendencies. After this initial rejection, Watkins' commanding officer in the USAAG, Captain Pastain, requested that Watkins be requalified for the position. Captain Pastain stated, "From daily personal contacts I can attest to the outstanding professional attitude, integrity, and suitablilty for assignment within the PRP, of SP5 Watkins. In the 6½ months he has been assigned to this unit SP5 Watkins has had no problems what-so-ever in dealing with other assigned members. He has, in fact, become one of our most respected and trusted soldiers, both by his superiors and his subordinates." ER at 26d. An examining Army physician concluded that Watkins' homosexuality appeared to cause no problem in his work, and the decision to deny Watkins a position in the Nuclear Surety Personnel Reliability Program was reversed.

Watkins worked under a security clearance without incident until he again stated, in an interview on March 15, 1979, that he was homosexual. This prompted yet another

Army investigation which, in july 1980, culminated in the revocation of Watkins' security clearance. As Watkins' notification of revocation makes clear, the Army based this revocation on Watkins' 1979 admission of homosexuality, on medical records containing Watkins' 1968 affidavit stating that he had engaged in homosexual conduct, and on his history of performing (with the permission of his commanding officer) as a female impersonator in various revues. The Army did not rely on any evidence of homosexual conduct other than Watkins' 1968 affidavit. *See supra* at 1331.

In October 1979, the Army accepted Watkins' application for another three-year reenlistment.

In 1981 the Army promulgated Army Regulation, (AR) 635-200, chpt. 15, which mandated the discharge of all homosexuals regardless of merit. Pursuant to this regulation, a new Army board convened to consider discharging Watkins. Although this board explicitly rejected the evidence before it that Watkins had engaged in homosexual conduct after 1968,[2] the board recommended that

[2] During these discharge proceedings the Army tried to prove that Watkins had engaged in homosexual conduct by introducing the testimony of one soldier that a black staff sergeant had "squeezed his leg" and the testimony of another soldier that Watkins has "asked him if he'd like to move into [Watkins'] apartment" and that Watkins used to "stare at" him. *Watkins v. United States Army*, 541 F.Supp. 249, 257 (W.D.Wash. 1982). The first soldier, however, was unable to identify Watkins in a line-up as the black sergeant who had squeezed his leg (there were thousands of black sergeants at the base). *Id.* The second soldier testified that he was not sure Watkins had been making a pass at him, that he was prejudiced against blacks and against homosexuals, that he had once had a bad experience with a homosexual, and that he had once been disciplined by a board of which Watkins was a member. *Id.* The Army board concluded that this evidence did not support a finding that Watkins had engaged in homosexual acts with these two soldiers, and the district court ruled that any finding to the contrary would have been arbitrary and unsupported by the evidence. *Id.*

Watkins be separated from the service "because he had stated that he is a homosexual."

Major General Elton, the discharge authority overseeing the board, approved this finding and recommendation and directed that Watkins be discharged. In addition, Major General Elton, on his own initiative, made an additional finding that Watkins had engaged in homosexual acts with other soldiers. The district court ruled both that Major General Elton lacked the regulatory authority to make supplemental findings, *Watkins v. United States Army*, 541 F.Supp. 249, 259 (W.D.Wash.1982), and that the evidence presented at the discharge hearing could not support a specific finding that Watkins had engaged in any homosexual conduct after 1968. *Id.* at 257. The Army has not contested either of these rulings and, on appeal, cites only Watkins' 1968 affidavits as evidence of homosexual conduct.

In May 1982, after the Army board voted in favor of Watkins' discharge, but before the discharge actually issued, the district court enjoined the Army from discharging Watkins on the basis of his statements admitting his homosexuality. *Id.* at 259 (W.D.Wash.1982).[3] The district court reasoned that the discharge proceedings were barred by the Army's regulation against double jeopardy, AR

[3] Watkins had originally brought suit in August 1981 to have his security clearance reinstated, but after receiving notice that discharge proceedings would be convened, he amended his complaint in October to seek an injunction against his discharge. The district court declined to reach the issue whether the Army could revoke Watkins' security clearance, reasoning that the issue was not yet ripe because Watkins had an administrative appeal pending. *See* 541 F.Supp. at 259; *see also* 551 F.Supp. at 223. Watkins security clearance dispute is thus not before us on this appeal.

635-200, ¶ 1-19b, because they essentially repeated the discharge proceedings of 1975.[4]

During oral argument before the district court, counsel for the Army declared that if the Army were enjoined from discharging Watkins, it would deny Watkins reenlistment, pursuant to AR 601-280, ¶ 2-21(c), when his current tour of duty expired in October 1982.[5] This reenlistment regulation, which was promulgated in 1981 along with the discharge regulation AR 635-200, chps. 15, makes homosexuality a nonwaiveable disqualification for reenlistment. The district court nonetheless enjoined Watkins discharge, and the Army fulfilled its promise by rejecting Watkins' reenlistment application "[b]ecause of self admitted homosexuality as well as homosexual acts." [6]

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[4] The district court held that the evidence could not support a finding that Watkins engaged in homosexual conduct subsequent to the 1975 discharge proceedings and that the Army's double jeopardy provision barred the Army from basing Watkins' discharge on statements that merely reiterated what Watkins had stated in the 1975 discharge proceedings – that he was homosexual. *See* 541 F.Supp. at 257-58.

[5] At that time, the regulation appeared at ¶ 2-24(c). However, for convenience, our opinion will refer to all Army regulations by the paragraph numbers used in the Army's September 15, 1986, update, unless date is explicitly noted.

[6] Again, we emphsaize that Watkins' 1968 affidavit stating that he had engaged in homosexual acts is the only evidence before this court that provides support for Captain Scott's finding of homosexual conduct. *See Supra* at 1332 & n. 2. That the Army had no new evidence of homosexual conduct is evident from the Army's intertogation of Watkins at the time that he applied for reenlistment. 551 F.Supp. at 225-32. During extraordinarily aggressive questioning aimed at eliciting a new confession of homosexual conduct from Watkins, the Army's interrogating officer admitted that he had no new basis for suspecting that Watkins had engaged in additional homosexual acts. *Id.* at 227.

On October 5, 1982, the district court enjoined the Army from refusing to reenlist Watkins because of his admitted homosexuality, holding that the Army was equitably estopped from relying on AR 601-280, ¶ 2-21(c). *Watkins v. United States Army*, 551 F.Supp. 212, 223 (W.D.Wash.1982).[7] The Army reenlisted Watkins for a six-year term on November 1, 1982, with the proviso that the reenlistment would be voided if the district court's injunction were not upheld on appeal.

While the Army's appeal of the district court injunction was pending, the Army rated Watkins' performance and professionalism. He received 85 out of 85 possible points. *See* Appendix to Appellant's Brief; Court Record 164, Appendix C. His ratings included perfect scores for "Earns respect," "Integrity," "Loyalty," "Moral Courage," "Self-discipline," "Military Appearance," "Demonstrates Initiative," "Performs under pressure," "Attains results," "Displays sound judgment," "Communicates effectively," "Develops subordinates," "Demonstrates technical skills," and "Physical fitness." *Id.* His military evaluators unanimously recommended that he be promoted ahead of his peers. *Id.* The Army's written evaluation of Watkins' performance and potential stated:

Captain Scott, who made the above findings, also found that Watkins had refused to answer questions concerning his homosexuality and homosexual acts, but the district court ruled that this finding was totally unsupported by the evidence. *See* 551 F.Supp. at 217. The Army has not contested this ruling of the district court and does not argue on appeal that Watkins refused to answer questions.

[7] This case does not involve an asserted right to reenlist or a claim that courts can exercise general review of the Army's reenlistment decisions. Watkins does not seek a judicial determination on the merits of his reenlistment application. He merely seeks a judicial determination that the Army must consider his reenlistment application on its merits without regard to his homosexuality. *See* 551 F.Supp. at 218.

SSG Watkins is without exception, one of the finest Personnel Action Center Supervisors I have encountered. Through his diligent efforts, the Battalion Personnel Action Center achieved a near perfect processing rate for SIPDERS transactions. During this training period, SSG Watkins has been totally reliable and a wealth of knowledge. He requires no supervision, and with his "can do" attitude, always exceeds the requirements and demands placed upon him. I would gladly welcome another opportunity to serve with him, and firmly believe that he will be an asset to any unit to which he is assigned.

SSG Watkins should be selected to attend ANCOC and placed in a Platoon Sergeant position. [Rater's Evaluation of Watkins' performance and potential.]

SSG Watkins' duty performance has been outstanding in every regard. His section continues to set the standard within the Brigade for submission of accurate, timely personnel and financial transactions. Keeping abreast of everchanging personnel regulations and directives, SSG Watkins has provided sound advice to the commander as well as to the soldiers within the command. His suggestion to separate S-1 and Personnel Action Center functions and to colocate the Personnel Action Center with the Company Orderly Rooms was adopted and immediately resulted in improved service by both offices. SSG Watkins' positive influence has been felt throughout the Battalion and will be sorely missed.

SSG Watkins' potential is unlimited. He has consistently demonstrated the capacity to manage numerous complex responsibilities concurrently. He is qualified for promotion now and should be selected for attendance at ANCOES at the earliest opportun-

ity. [Indorser's Evaluation of Watkins' performance and potential.]

Id.

On appeal, we reversed the district court's injunction. We reasoned that the equity powers of the federal courts could not be exercised to order military officials to violate their own regulations absent a determination that the regulations were repugnant to the Constitution or to the military's statutory authority. *Watkins v. United States Army*, 721 F.2d 687, 690-91 (9th Cir. 1983) [hereinafter *Watkins I*]. On remand, the district court held that the Army's regulations were not repugnant to the Constitution or to statutory authority and accordingly denied Watkins' motion for summary judgment and granted summary judgment in favor of the Army. Watkins appealed, invoking our jurisdiction under 28 U.S.C. § 1291.

Watkins argues on this appeal that the Army's actions in discharging him and denying him reenlistment violate the First Amendment and constitute due process entrapment in violation of the Fifth Amendment. He also argues that the Army's discharge and reenlistment regulations are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), and deny him equal protection of the laws in violation of the Fifth Amendment. Notably, Watkins recognizes that the Supreme Court's decision in *Bowers V. Hardwaick*, 478 U.S. 186, 106.S.Ct. 2841, 92 L.Ed. 2d 140 (1986), foreclosures this court from deciding that the Army's regulation violate substantive due process. *See infra* at 1339-43.

II

Almost all of Watkins' arguments can be rejected without reaching their merits. Watkins' argument that denying him reenlistment was arbitrary and capricious under

the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982), fails because Watkins does not claim that the regulations on homosexuality themselves violate the Administrative Procedure Act. *See Watkins I*, 721 F.2d at 690-91. Similar reasons lead us to reject two additional claims raised by Watkins: his "petition clause" argument that the Army refused to reenlist Watkins in retaliation for his suit over revocation of his security clearance and his "due process entrapment" claim that the Army had induced him to believe that his homosexuality would not disqualify him from a career in the Army. Whether or not the Army's actions, in the absence of the regulations, would have constituted unconstitutional retaliation or due process entrapment, to enjoin the Army from denying Watkins' reenlistment on the basis of his homosexuality would be in direct contravention of its regulations. This we cannot do unless the regulations themselves are unconstitutional. *Id.* Since Watkins does not allege that the regulations, either on their face or as applied, violate the petition clause or constitute due process entrapment, we have no authority to issue the requested relief on those grounds.

Watkins' argument that the Army regulations violate the First Amendment by penalizing his statements regarding his homosexuality is somewhat more troublesome. *See benShalom v. Secretary of the Army*, 489 F.Supp. 964, 973-75 (E.D.Wis.1980) (holding that the Army violated the First Amendment by discharging soldier solely because she stated she was a homosexual when there was no evidence of homosexual conduct). In contrast to *benShalom*, however, the determination of Watkins' homosexuality—which absolutely disqualified him from service under the regulations—was based both on his various statements admitting his homosexual orientation and on his 1968 statement that he had engaged in

homosexual acts. The regulations clearly mandate that homosexual acts give rise to a disqualifying presumption of homosexuality, though that presumption can be rebutted by proof of actual nonhomosexual orientation. *See infra* at 1336-39. In other words, under the regulations, any *homosexual* who engages in homosexual acts is automatically disqualified from service. Since Watkins admitted in 1968 that he had engaged in homosexual acts, he was presumed under the regulations to have a homosexual orientation, and could not rebut that presumption because his orientation was, in fact, homosexual. Thus, the regulations mandated both Watkins' discharge and the denial of his reenlistment regardless of whether he had ever stated that he had homosexual tendencies. Consequently, Watkins could obtain no relief from a judicial determination that his statements declaring his homosexual orientation were protected by the First Amendment unless he could also show that the portions of the Army's regulations that ban homosexuals who engage in homosexual *acts* are invalid.[8] *See Matthews v. Marsh*, 755 F.2d 182,

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[8] *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.E.2d 471 (1977), is not to the contrary. In *Mt. Healthy*, the Supreme Court held that government action can violate the First Amendment when it is taken for mixed motions, one of which is to penalize an individual for exercising his right to freedom of speech. *See id.* at 284-87, 97 S.Ct. at 574-76. The Supreme Court adopted a "but for" causation test: Once a plaintiff demonstrates that his conduct is constitutionally protected and a "substantial factor" in the government's adverse decision, the burden of proof shifts to the government to show that it would have reached the same decision in the absence of the protected conduct. *Id.* at 287, 97 S.Ct. at 576. *Mt. Healthy*, however, concerned a *discretionary* decision not to grant tenure to a teacher who had engaged in constitutionally protected speech. This case, in contrast, involves a nondiscretionary regulation that *absolutely* disqualified Watkins from Army service because he was a homosexual who admitted to engaging in homosexual acts.

184 (1st Cir. 1985) (in light of evidence that plaintiff engaged in homosexual acts, a ruling as to whether her discharge from the Army for statements about her homosexuality violated the First Amendment would be an advisory opinion).

We are left, then, with Watkins' claim that the Army's regulations deny him equal protection of the laws in violation of the Fifth Amendment.[9] Specifically, Watkins argues that the Army's regulations constitute an indivious discrimination based on sexual orientation. To address this claim we must engage in a three-stage inquiry. First, we must decide whether the regulations in fact discriminate on the basis of sexual orientation. Second, we must decide which level of judicial scrutiny applies by asking whether discrimination based on sexual orientation burdens a suspect or quasi-suspect class,[10] which would

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See AR 635-200, ¶ 15-3; AR 601-280, ¶ 2-21(c). The government's burden under *Mt. Healthy* to show that it would have reached the same decision in the absence of the protected speech is therefore met by the dictates of the regulation themselves.

[9] The equal protection component of the Fifth Amendment imposes precisely the same constitutional requirements on the federal government as the equal protection clause of the Fourteenth Amendment imposes on state governments. *See, e.g., Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975).

[10] Discriminations that burden some depised or politically powerless groups are so likely to reflect antipathy against those groups that the classifications are inherently suspect and must be strictly scrutinized. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 n. 14, 102 S.Ct. 2382, 2394 n. 14, 72 L.Ed.2d 786 (1982). Such groups are generally termed "suspect classes." The Supreme Court has identified other groups whose history of past discrimination entitles them to intermediate scrutiny protection under equal protection doctrine. Such groups are termed "quasi suspect" classes. *See generally*, Nowak, Rotunda & Young, *Constitutional Law*, Ch. 16 § 1, at 593 (2 ed. 1983).

make it subject, respectively, to strict or intermediate scrutiny. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). If discrimination burdens no such class, it is subject to ordinary rationality review. *Id.* Finally, we must decide whether the challenge regulations survive the applicable level of scrutiny by deciding whether, under strict scrutiny, the legal classification is necessary to serve a compelling governmental interest; whether, under intermediate scrutiny, the classification is substantially related to an important governmental interest; or whether, under rationality review, the classification is rationally related to a legitimate governmental interest. *See id.*

III

We now turn to the threshold question raised by Watkins' equal protection claim: Do the Army's regulations discriminate based on sexual orientation? The portion of the Army's reenlistment regulation that bars homosexuals from reenlisting states in full:

> Applicants to whom the disqualifications below apply are ineligible for RA [Regular Army] reenlistment at any time and requests for waiver or exception to policy will not be submitted. . . .
>
> C. Persons of questionable moral character and a history of antisocial behavior, sexual perversion or homosexuality. A person who has committed homosexual acts or is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service is included. (See note 1). . . .
>
> k. Persons being discharged under AR 635-200 for homosexuality. . . .

> *Note:* Homosexual acts consist of bodily contact between persons of the same sex, activity undertaken or passively permitted, with the intent of obtaining or giving sexual satisfaction, or any proposal, solicitation, or attempt to perform such an act. Persons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiousity [sic], or intoxication, and the absence of other evidence that the person is a homosexual, normally will not be excluded from reenlistment. A homosexual is a person, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent to obtain or give sexual gratification. Any official, private, or public profession of homosexuality, may be considered in determining whether a person is an admitted homosexual.

AR 601-280, ¶ 2-21. Although worded in somewhat greater detail, the Army's regulation mandating the separation of homosexual soldiers from service (discharge), AR 635-200, is essentially the same in substance.[11]

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[11] AR 635-200 provides:

15-2 Definitions . . .

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

c. A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.

15-3 Criteria

The basis for separation may include preservice, prior service, or current service conduct or statements. A soldier will be separated

We conclude that these regulations, on their face, discriminate against homosexuals on the basis of their sexual

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per this chapter if one or more of the following approved findings is made:

a. The soldier has engaged in, attempted to engage in, or solicited another to engage in a homosexual act unless there are further approved findings that –

(1) Such conduct is a departure from the soldier's usual and customary behavior; and

(2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and

(4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and

(5) The soldier does not desire to engage in or intend to engage in homosexual acts.

Note: To warrant retention of a soldier after finding that he or she engaged in, attempted to engage in, or solicited another to engage in a homosexual act, the board's findings must specifically include all *five* findings listed in a(1) through (5) above. In making these additional findings, boards should reasonably consider the evidence presented. For example, engagement in homosexual acts over a long period of time could hardly be considered "a departure from the soldier's usual and customary behavior." The intent of this policy is to permit retention *only* of *nonhomosexual* soldiers who, because of extenuating circumstances (as demonstrated by findings required by para 15-3a(1) through (5)) engaged in, attempted to engage in, or solicited a homosexual act.

b. The soldier has stated that he or she is a homosexual or bisexual, unless there is a further finding that the soldier is not a homosexual or bisexual.

c. The soldier has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the person involved) unless there are further find-

orientation. Under the regulations any homosexual act or statement of homosexuality gives rise to a presumption of homosexual orientation, and anyone who fails to rebut that presumption is conclusively barred from Army service. In other words, the regulations target homosexual orientation itself. The homosexual acts and statements are merely relevant, and rebuttable, indicators of that orientation.

Under the Army's regulations, "homosexuality," not sexual conduct, is the operative trait for disqualification. AR 601-280, ¶ 2-21(c); *see also* AR 635-200, ¶ 15-1(a) (articulating the same goal). For example, the regulations ban homosexuals who have done nothing more than acknowledge their homosexual orientation even in the absence of evidence that the persons ever engaged in any form of sexual conduct. The reenlistment regulation disqualifies any "admitted homosexual"—a status that can be proved by "[a]ny official, private, or public profession of homosexuality" even if "there is no evidence that they have engaged in homosexual acts either before or during military service." AR 601-280, ¶ 2-21(c) & note; *see also* AR 635-200,

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> ings that the soldier is not a homosexual or bisexual (such as, where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

AR 635-200, ¶¶ 15-2 & 15-3 (emphasis in original).

Although it is the Army's refusal to reenlist Watkins because of his homosexuality that is directly at issue, Watkins' challenge to the Army's regulation on discharge is relevant to this appeal for two reasons: (1) persons being validly discharged for homosexuality at the time of reenlistment, as Watkins was, cannot reenlist under 601-280 ¶¶ 2-21(k); (2) enjoining the Army to consider Watkins' reenlistment application without regard to his homosexuality will provide no effective relief if he would be subject to mandatory discharge because of homosexuality as soon as he was reenlisted. We thus consider Watkin's challenge to the constitutionality of the Army's discharge regulation as well as its reenlistment regulation.

¶ 15-3(b). Since the regulations define a "homosexual" as "a person, regardless of sex, who *desires* bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent to obtain or give sexual gratification," a person can be deemed homosexual under the regulations without ever engaging in a homosexual act. 601-280, ¶ 2-21(c) & note (emphasis added); *see also* A.R. 635-200, 15-2(a) (same desire sufficient to make one homosexual). Thus, no matter what statements a person has made, the ultimate evidentiary issue is whether he or she has a homosexual orientation. Under the reenlistment regulation, persons are disqualified from reenlisting only if, based on any "profession of homosexuality" they have made, they are found to have a homosexual orientation. AR 601-280, ¶ 2-21(c) & note. Similarly, under the discharge regulation a soldier must be discharged if "[t]he soldier has stated that he or she is a homosexual or bisexual, *unless* there is a further finding that the soldier is not a homosexual or bisexual." AR 635-200, ¶ 15-3(b) (emphasis added). In short, the regulations do not penalize all statements of sexual desire, or even only statements of homosexual desire; they penalize only homosexuals who declare their homosexual orientation.

True, a "person who has committed homosexual acts" is also presumptively "included" under the reenlistment regulation as a person excludable for "homosexuality." AR 601-280, ¶ 2-21(c); *see also* AR 635-200, ¶ 15-3(a). But it is clear that this provision is merely designed to round out the possible evidentiary grounds for inferring a homosexual orientation. The regulations define "homosexual acts" to encompass any "bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual satisfaction, or any proposal, solicitation, or attempt to perform such an act." AR 601-280, ¶ 2-21(c) &

note; *see also* AR 635-200, ¶¶ 15-2(c) & 15-3(a) (stating the same in slightly different order). Thus, the regulations barring homosexuals from the Army cover any form of bodily contact between persons of the same sex that gives sexual satisfaction—from oral and anal intercourse to holding hands, kissing, caressing and any number of other sexual acts. Indeed, in this case the Army tried to prove at Watkins' discharge proceedings that he had committed a homosexual act described as squeezing the knee of a male soldier, but failed to prove it was Watkins who did the alleged knee-squeezing. *See supra* at 1332 & n. 2. Moreover, even non-sexual conduct can trigger a presumption of homosexuality: The regulations provide for the discharge of soldiers who have "married or attempted to marry a person known to be of the same sex . . . *unless* there are further findings that the soldier is not a homosexual or bisexual." AR 635-200, ¶ 15-3(c) (emphasis added). With all the acts and statements that can serve as presumptive evidence of homosexuality under the regulations, it is hard to think of any grounds for inferring homosexual orientation that are *not* included.[12] The fact remains,

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[12] In stark contrast to the breadth and focus of the regulations, the only statue Congress has enacted regulating the private consensual sexual activity of military personnel covers only sodomy, not other forms of sexual conduct, and covers sodomy whether engaged in by homosexuals or heterosexuals. 10 U.S.C. § 925 (1982) provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Although the statute does not define "sodomy" or "unnatural carnal copulation," the statute does require proof of "penetration," which apparently limits sodomy to oral and anal copulation. *See United States v. Harris*, 8 M.J. 52, 53-59 (C.M.A. 1979). Moreover, the

however, that homosexual orientation, not homosexual conduct, is plainly the object of the Army's regulations.

Moreover, under the regulations a person is not automatically disqualified from Army service just because he or she committed a homosexual act. Persons may still qualify for the Army despite their homosexual conduct if they prove to the satisfaction of Army officials that their *orientation* is heterosexual rather than homosexual. To illustrate, the discharge regulation provides that a soldier who engages in homosexual acts can escape discharge if he can show that the conduct was "a separture from the soldier's usual and customary behavior" that "is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service" *and* that the "soldier does not desire to engage in or intend to engage in homosexual acts." AR 635-200, ¶ 15-3(a). The regulation expressly states, "The intent of this policy is to permit retention *only* of *nonhomosexual* soldiers who, because of extenuating circumstances engaged in, attempted to engage in, or solicited a homosexual act." *Id.* at note (emphasis in original). Similarly, the Army's ban on reenlisting persons who have committed homosexual acts does not apply to "[p]ersons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiousity [sic], or intoxication, and in the absence of other evidence that the person is a homosex-

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statute explicitly regulates sodomy without regard to sexual orientation by making sodomy illegal whether engaged in by persons of "the same or opposite sex." 10 U.S.C. § 925.

The Army has never made a finding that Watkins ever engaged in an act of sodomy in violation of section 925. Indeed, the Army twice investigated Watkins for allegedly committing sodomy in violation of section 925 and had to drop both investigations because of "insufficient evidience." *See supra* at 1331-32 & n. 2.

ual." AR 601-280, ¶ 2-21 note. If a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated. In short, the regulations do not penalize soldiers for engaging in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay.[13]

In sum, the discrimination against homosexual orientation under these regulations is about as complete as one could imagine.[14] The Regulations make any act or statement that might conceivably indicate a homosexual orientation evidence of homosexuality; that evidence is in turn

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[13] This distinction based on sexual orientation may have directly affected the Army's treatment of Watkins because, were it not for his admitted homosexual orientation, Watkins might have been able to continue his 14-year career by arguing that the homosexual acts to which he admitted in 1968 were the product of his immaturity or curiosity.

[14] We cannot agree with the premise of Judge Reinhardt's dissent that the Army disqualified Watkins from service because of his homosexual *conduct* as opposed to his homosexual *orientation*. *Dissent* at 1361. First, the regulations encompass all possible evidentiary grounds for inferring homosexual orientation and merely include homosexual acts as one possible, but by no means necessary, ground for drawing that inference. Second, the specific regulations allow some soldiers to remain in the Army despite homosexual conduct if they can prove that they in fact have a non-homosexual orientation.

We also note that homosexual orientation encompasses a range of emotions, desires, and needs wholly separate from sexual conduct and involves an element of individual self-definition in addition to sexual conduct. We cannot agree with the dissent's view (*Dissent* at 1356-57, 1360-62) that the class comprised of persons who consider themselves homosexual is virtually identical to the class of persons who engage in homosexual conduct, and sodomy in particular.

weighed against any evidence of a heterosexual orientation. It is thus clear in answer to our threshold equal protection inquiry that the regulations directly burden the class consisting of persons of homosexual orientation.[15]

IV

Before reaching the question of the level of scrutiny applicable to discrimination based on sexual orientation and the question whether the Army's regulations survive the applicable level of scrutiny, we first address the Army's argument that we are foreclosed by existing Supreme Court and Ninth Circuit precedent from holding that the Army's regulations deny Watkins equal protection of the laws because they discriminate on the basis of homosexual orientation. The Army first argues that the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), forecloses Watkins' equal protection challenge to its regulations. In *Hardwick*, the Court rejected a claim by a homosexual that a Georgia statute criminalizing sodomy deprived him of his liberty without due process of law in violation of the Fourteenth Amendment. More specifically, the Court held that the constitutionally protected right to privacy – recognized in cases such as *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) – does not extend to acts of consensual homosexual

[15] Of course, in their attempt to identify soldiers of homosexual orientation, the regulations discriminate in their treatment of homosexual and heterosexual *conduct*. While homosexual acts subject the participants to discharge proceedings by triggering the regulatory presumption of "homosexuality," the identical acts when engaged in by members of the opposite sex do not subject the participants to any such proceedings.

sodomy.[16] *See id.* 106 S.Ct. at 2843-46. The Court's holding was limited to this due process question. The parties did not argue and the Court explicitly did not decide the question whether the Georgia sodomy statute might violate the equal protection clause. *See id.* 106 S.Ct. at 2846 & n. 8.[17]

The Army nonetheless argues that it would be "incongrous" to hold that its regulations deprive gays of equal protection of the laws when *Hardwick* holds that there is no constitutionally protected privacy right to engage in homosexual sodomy. Army's Second Supp. Brief at 19. We disagree. First, while *Hardwick* does indeed hold that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy, nothing in *Hardwick* suggests that the state may penalize gays for their sexual orientation. *Cf. Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d (1962)

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[16] Under the Court's analysis, because the Constitution's protection of the right to privacy does not extend to homosexual sodomy, a judgment by the state that sodomy is immoral provides a sufficiently rational basis for sodomy laws to satisfy the requirements of substantive due process. *See Hardwick*, 106 S.Ct. at 2846.

[17] *See also Hardwick*, 106 S.Ct. at 2849 (Blackmun J. dissenting) (Court "refused to consider" equal protection clause); *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C.Cir.1986) ("Although . . . the Supreme Court's recent decision in *Bowers v. Hardwick* [held] that homosexual *conduct* is not constitutionally protected, the Court did not reach the different issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*." (footnotes omitted and emphasis in the original)), *cert. granted sub nom. Webster v. Doe*, ___ *U.S.* ___, *107 S.Ct. 3182, 96 L.Ed.2d 671; Swift v. United States*, 649 F.Supp. 596, 601 (D.D.C.1986) ("this Circuit has declined to read [*Hardwick*] as barring claims of discrimiation based on sexual preference"); *but cf. Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987) ("reasoning in *Hardwick* forecloses . . . suspect class status for practicing homosexuals").

(holding that state violated due process by criminalizing the status of narcotics addition, even though the state could criminalize the use of the narcotics—conduct in which narcotics addicts by definition are prone to engage).

Second, although *Hardwick* held that the due process clause does not prevent states from criminalizing acts of homosexual sodomy, *id.* 106 S.Ct. at 2842 n. 2, nothing in *Hardwick* actually holds that the state may make invidious distinctions when regulating sexual conduct. Unlike the Army's regulations, the Georgia sodomy statute at issue in Hardwick was neutral on its face, making anal and oral intercourse a criminal offense whether engaged in by partners of the same or opposite sex. *See id.* S.Ct. at 2842 n. 1.[18] In deciding a due process challenge to the Georgia statute as applied to homosexual sodomy,[19] the *Hardwick* Court simply did not address either the question whether heterosexual sodomy also falls outside the scope of the right to privacy or the separate question whether homosexual but not heterosexual sodomy may be criminalized without violating the equal protection clause. We cannot read *Hardwick* as standing for the proposition that government may outlaw sodomy only when committed by a disfavored class of persons. Surely, for example, *Hardwick* cannot be read as a license for the government to outlaw sodomy only when committed by blacks. If government insists on regulating private sexual conduct between consenting adults, it must, at a minimum, do so

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[18] *Cf. United States v. Lemons*, 697 F.2d 832, 837-38 (8th Cir.1983) (rejecting homosexual's equal protection challenge to sodomy statue because criminal law also prohibited the same conduct between persons of the opposite sex).

[19] The district court had dismissed two heterosexual plaintiffs for lack of standing, and they did not appeal. *Hardwick*, 106 S.Ct. at 2842 n. 2.

evenhandedly—prohibiting all persons from engaging in the proscribed sexual acts rather than placing the burden of sexual restraint solely on a disfavored minority.[20]

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[20] Judge Reinhardt argues in dissent that our opinion reads *Hardwick* as "implicitly permitting the regulation of heterosexual conduct" thereby "increas[ing]—exponentially—the damage to the right to privacy caused by *Hardwick*." *Dissent* at 1355. First, we do not read *Hardwick* as reversing or even undermining any of the cases establishing and defining the right to privacy. We simply read *Hardwick* as refusing to *extend* the constitutionally protected right to privacy to acts of homosexual sodomy. Second, we do not read *Hardwick* as passing judgment one way or the other on whether the constitutionally protected right to privacy extends to heterosexual sodomy. We do note, however, that the Court's reasoning in *Hardwick* rests in major part on its determination that at one time all 50 states outlawed sodomy and that 24 states and the District of Columbia continue to outlaw sodomy. "Against this background," Justice White reasoned, it would be "at best facetious" to claim that "a right to engage in such conduct is 'deeply rooted in our history and tradition' or 'implicit in the concept of ordered liberty.'" 106 S.Ct. at 2845-46. In making this point the Court drew no distinction between homosexual and heterosexual sodomy, nor do 19 of the 25 jurisdictions that still outlaw sodomy. *See* Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L.Rev. 521-26 (1986).

The dissent's interpretation of *Hardwick*—that it authorizes the state to single out homosexual conduct for criminal sanction *because* that conduct is committed by homosexuals—is wide of the mark. *Hardwick* explicitly focused on the question whether the right to privacy extends constitutional protection to the commission of homosexual sodomy. *See* 106 S.Ct. at 2844-46. In essence, the dissent shifts *Hardwick's* focus away from substantive due process and the right to privacy towards the right of homosexuals to enjoy equal treatment under the laws. Such an expansively anti-homosexual reading of *Hardwick* is unsupported and unfair both to homosexuals and the Supreme Court.

We also cannot agree with the dissent's assertion that the equal protection clause is entirely "procedural in nature" and that, therefore, our equal protection analysis is coherent "[o]nly if heterosexual

The Army also argues that *Hardwick*'s concern "about the limits of the Court's role in carrying out its constitutional mandate," 106 S.Ct. at 2843, should prevent courts from holding that equal protection doctrine protects homosexuals from discrimination. To be sure, the Court in *Hardwick* justified its refusal to further extend the scope of the right to privacy largely by pointing to the problems allegedly created when judges recognize constitutional "rights not readily identifiable in the Constitution's text" and "having little or no cognizable roots in the language or design of the Constitution." 106 S.Ct. at 2844, 2846. The Court stressed its concern that such rights might be perceived as involving "the imposition of the Justices' own choice of values on the States and the Federal Government" and that this antidemocratic perception might undermine the legitimacy of the Court. *Id.* Finally, the Court expressed the more specific concern about potential difficulties in defining the contours of the right to privacy. *See id.* at 2846.

While it is not our role to question *Hardwick*'s concerns about substantive due process and specifically the right to privacy, these concerns have little relevance to equal protection doctrine.[21] The right to equal protection of the

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sodomy is *not* protected by the right to privacy." *Dissent* at 1355 n. 5. However the Supreme Court defines the right to privacy – whether that definition includes a right to engage in heterosexual sodomy, homosexual sodomy, neither, or both – the equal protection clause imposes an independent obligation on government not to draw invidious distinctions among its citizens. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 265, 103 S.Ct. 2985, 2995, 77 L.Ed.2d 614 (1983) ("The concept of equal justice under law requires the State to govern impartially"). We do not read *Hardwick* as in any way eroding that principle.

[21] Dean John Hart Ely, for example, has severely criticized the Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), while at the same time expressing the view that

laws has a clear basis in the text of the Constitution. This principle of equal treatment, when imposed against majoritarian rule, arises from the Constitution itself, not from judicial fiat. Moreover, equal protection doctrine does not prevent the majority from enacting laws on its substantive value choices. Equal protection simply requires that the majority apply its value evenhandedly. Indeed, equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression. The requirement of evenhandedness also facilitates a representation of minorities in government that advances the operation of representative democracy.[22] Finally, the practical difficulties of defining the requirements imposed by equal protection, while not insignificant, do not involve the judiciary in the same degree of value-based line-drawing that the Supreme Court in *Hardwick* found so troublesome in defining the contours of substantive due process. In sum, the driving force behind *Hardwick* is the

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governmental classifications burdening homosexuals merit heightened scrutiny under the equal protection clause. *Compare* J. Ely, Democracy and Distrust 248 n. 52 (1980), *with id.* at 162-64, 93 S.Ct. at 731-32. *See generally infra note* [22].

[22] *See generally* J. Ely,*supra* note 21, at 101-02 ("unlike an approach geared to the judicial imposition of 'fundamental values,' the representation-reinforcing [approach] . . . is not inconsistent with, but to the contrary is entirely supportive of, the American system of representative democracy. It recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.").

Court's ongoing concern with the expansion of rights under substantive due process, not an unbounded antipathy toward a disfavored group.

The Army also relies upon *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980), *cert. denied*, 452 U.S. 905,101 S.Ct 3030, 69 L.Ed.2d 405 (1981). This reliance, however, is misplaced because *Beller*, like *Hardwick*, is s substantive due process case, not an equal protection case. In rejecting a substantive due proces challenge to Navy regulations providing for the discharge of personnel who engaged in homosexual acts, our court held in *Beller* that substantive due process required only that courts balance the governmental and individual interests at stake in a fashion similar to intermediate scrutiny. *Beller*, 632 F.2d at 805-12. As now Justice Kennedy's carefully tailored opinion makes clear, Beller's appeal did "not require us to address the question whether consensual private homosexual conduct is a fundamental right as that term is used in equal protection . . . [and was] not presented to us as implicating a suspect or quasi-suspect classification . . . . Substantive due process, not equal protection, was the basis of the constitutional claim, and we address the case in those terms." *Id* at 807. Thus, *Beller* like *Hardwick*, is clearly not precedent foreclosing Watkins' claim that challenged governmental regulations discriminate against a suspect class in violation of equal protection doctrine. *See Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc) (a prior decision is not binding precedent on issues that were neither raised by counsel nor discussed in the opinion of the court); *Sakamoto v. Duty Free Shoppers*, 764 F.2d 1285, 1288 (9th Cir. 1985) (same).

The Army further argues that our decision in *Hathaway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.(, *cert. denied*, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981), forecloses Watkins' equal protection claim. Again,

we cannot agree. In *Beller*, our court reserved two distinct equal protection questions: first, whether the challenged regulations penalizing homosexual conduct burdened the exercise of a funcamental or important substantive right to engage in certain conduct; second, whether the challenged regulations discriminated against a suspect or quasi-suspect class. As explained below, in *Hatheway* we clearly answered the first of these discrete equal protection questions. The Army argues, however, that *Hatheway* also decided the second question reserved in *Beller*—the question raised in Watkins' claim—whether homosexuals constitute a suspect or quasi-suspect class.[23]

Hatheway, a soldier convicted of committing sodomy in violation of 10 U.S.C. § 925, claimed that the Army was prosecuting cases involving homosexual sodomy while refusing to prosecute cases involving heterosexual sodomy. Our court "understood Hatheway's claim (that the commission of a homosexual act is an impermissible basis for prosecution) to be an equal protection argument," *Hatheway*, 641 F.2d at 1382, which we treated as resting on the branch of equal protection doctrine concerned with whether a governmental classification burdens a fundamental or important substantive right to engage in certain conduct. Thus, we explicitly characterized Hatheway's claim "that the commission of a homosexual act is an impermissible basis for prosecution" to be the sort of equal

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[23] Under equal protection doctrine, heightened scrutiny not only applies to legal classifications that burden suspect or quasi-suspect classes but also applies to classifications that burden the exercise of fundamental or important substantive rights to engage in certain conduct. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-17 & nn. 14-15, 102 S.Ct. 2382, 2394-95 & nn. 14-15, 72 L.Ed.2d 786 (1982); *Maher v. Roe*, 432 U.S. 464, 470-78, 97 S.Ct. 2376, 2380-85, 53 L.Ed.2d 484 (1977); L. Tribe, American Consititutional Law § 16-7, at 1002-03, §16-31, at 1089-90 & n. 1 (1978).

protection claim that "implicate[d] the 'right to be free . . . from unwarranted intrusions into one's privacy.' " 641 F.2d at 1382 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247-48, 22 L.Ed.2d 542 (1969)). We then reasoned that the interest at stake in *Hatheway* was similar to the substantive interest at stake in *Beller*. 641 F.2d at 1382. Because in *Beller* we decided that under the due process clause the right to engage in homosexual conduct merited "heightened solicitude," but not strict scrutiny, in *Hatheway* we adopted this assessment for the purposes of our fundamental rights equal protection analysis. Accordingly, we applied intermediate scrutiny to the Army's actions and held that "the selection of cases involving homosexual acts for Article 125 prosecutions" was permissible because such prosecutions bore "a substantial relationship to an important government interest." *Id.* Thus, we rejected Hatheway's claim based on an analysis of the fundamental rights branch of equal protection doctrine, the branch of equal protection doctrine upon which Watkins *does not* rely.

The Army argues that we should nonetheless read *Hatheway* as precluding Watkins' claim that homosexuals constitute a suspect or quasi-suspect class. In support of this argument, the Army relies upon a single sentence in a footnote—the opinion's only reference to suspect class analysis. In footnote 6 we wrote: "Though '[t]he courts have not designated homosexuals a "suspect" or "quasi-suspect" classification so as to require more exacting scrutiny,' *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979), heightened scrutiny is independently required where a classification penalizes the exercise of a fundamental right. *See Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969)." 641 F.2d at 1382 n. 6. Although we recognize that the intended purpose of this footnote is not entirely clear,

we cannot fairly read this passing reference as an adjudication of the important and unresolved constitutional question whether homosexuals constitute a suspect or quasi-suspect class for the purpose of equal protection analysis. Rather, we read foot note 6 as simply clarifying the distinction between the suspect class and fundamental rights branches of equal protection doctrine while acknowledging that at the time of the *Hatheway* decision courts had not yet decided whether homosexuals constitute a suspect or quasi-suspect class. That the critical language in footnote 6 is taken directly from our opinion in *DeSantis*, 608 F.2d 327, informs our reading. In *DeSantis*, we acknowledged that our court had not yet designated homosexuals as a suspect or quasi-suspect class, but we did not decide that homosexuals should not be so designated. *See infra* at 1344. Similarly, in footnote 6 of *Hatheway*, we remarked on the existing state of the law with respect to homosexuals without deciding the open question whether homosexuals constitute a suspect or quasi-suspect class. In other words, we read *Hatheway* as interpreting the equal protection claim presented as resting solely on the fundamental rights branch of equal protection analysis. *Hatheway* is also distinguishable from this case because, like *Hardwick* and *Beller*, *Hatheway* involved a classification based on homosexual conduct, not homosexual orientation. As we emphasize throughout our opinion, this distinction is critical to an analysis of Watkins' particular equal protection claim.

Because we read *Hatheway* as not deciding the suspect class issue, and because the suspect class and fundamental rights branches of equal protection doctrine involve very separate inquiries, *see e.g., San Antonio School Indep. District v. Rodriguez*, 411 U.S. 1, 18-39, 93 S.Ct. 1278, 1288-1300, 36 L.Ed.2d 16 (1973); Perry, *Modern Equal Protection*, 79 Colum.L.Rev. 1023, 1074-83 (1979);

Developments in the Law-Equal Protection, 82 Harv.L. Rev. 1065, 1087-1131 (1969), our general rules of *stare decisis* dictate that Hatheway is not controlling precedent for Watkins' equal protection claim based on the argument that homosexuals constitute a suspect or quasi-suspect class. *See Sethy*, 545 F.2d at 1159-60 (en banc); *Sakamoto*, 764 F.2d at 1288.

Finally, we reject the Army's contention that in *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), our court held that homosexuals do not constitute a suspect or quasi-suspect class. Rather, we held in *DeSantis* that homosexuals were not a protected class within the meaning of 42 U.S.C. § 1985(3), which secures a right of action against private parties who conspire to deprive "any person or class of persons of the equal protection of the laws." Although our interpretation of section 1985(3) turned in part on the observation that "[t]he courts *have not* designated homosexuals a 'suspect' or 'quasi-suspect' classification," 608 F.2d at 333 (emphasis added), we did not consider whether homosexuals *should be* designated a suspect class. Nor was it necessary to reach that issue because, under *DeSantis's* interpretation of the statute, section 1985(3) protects only those groups that *have been* determined by the government to need special federal assistance in protecting their civil rights. 608 F.2d at 333.[24] Thus, our decision that section 1985(3) did not protect homosexuals turned simply on the point that courts had not *yet* designated homosexuals a suspect class. Although *DeSantis* does not articulate its reasons for requiring a

[24] Along with subsequent cases, *DeSantis* has established that there are only two ways of making this showing under §1985(3): (1) proving that Congress *has* enacted statues offering special protection to the class; or (2) proving that courts *have* offered special protection to the class by designating it a suspect or quasi-suspect class. *Id.; see also Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir.1985).

prior governmental determination, it seems likely—since section 1985(3) authorizes suits against private individuals and requires no state action—that our court's interpretation of the statute was animated by concerns about providing potential defendants with sufficient notice of the statute's scope. *Cf. Marks v. United States*, 430 U.S. 188, 192, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (judicial enlargement of the scope of criminal statute without fair notice violates due process).

While neither the Supreme Court nor the Ninth Circuit has decided the question presented in Watkins' appeal—whether persons of homosexual orientation constitute a suspect class under equal protection doctrine—several other circuits have considered the different but related question whether laws burdening the class of individuals engaging in homosexual *conduct* trigger heightened scrutiny under the equal protection clause. Only one circuit, however, has given the issue more than cursory treatment.[25] In *Padula v. Webster*, 822 F.2d 97 (D.C. Cir.

[25] The Fifth and Tenth circuits have also considered this question. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir.1985) (en banc), *On Petition for Rehearing En Banc*, 774 F.2d 1285 (5th Cir.1985) (stressing that statute at issue was "directed at certain conduct, not at a class of people"), *cert. denied*, ___U.S.___, *106 S.Ct. 3337-38, 92 L.Ed. 2d 742 (1986); National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir.1984) (statute at issue proscribes "public homosexual activity" by teachers), *aff'd without opinion by an equally divided Court*, 470 U.S. 903, 105 S.Ct. 1858, 84 L.Ed. 2d 776 (1985). Both of these circuits held that discrimination based on homosexual conduct does not merit heightened scrutiny under the equal protection clause, but neither circuit attempted any serious analysis of the issue. *See Baker v. Wade*, 769 F.2d at 292 (noting merely that the plaintiff "has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification"); *National Gay Task Force*, 729 F.2d at 1273 (stating summarily that classification based on choice of sexual partners could not be suspect because Supreme Court has not held gender to be a suspect classification); *see*

1987), the District of Columbia Circuit rejected an equal protection challenge to the FBI's policy of discriminating against "practicing homosexuals" in its hiring decisions. The D.C. Circuit did not analyze whether the class of persons engaging in homosexual conduct satisfies the traditional indicia of suspectness, *see infra* at 1345-49, but rather concluded summarily (as the Army and the dissent urge us to do here) that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." *Id.* at 103. The D.C. Circuit reasoned that "[i]f the [Supreme] Court [in *Hardwick*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.*

Padula's reasoning, echoed in Judge Reinhardt's dissent, rests on the false premise that *Hardwick* approves discrimination against homosexuals. *See supra* at 1340. To repeat what we said above, *Hardwick* held only that the constitutionally protected right to privacy does not extend to homosexual sodomy. But we see no principled way to transmogrify the Court's holding that the state may criminalize specific sexual conduct commonly engaged in by homosexuals into a state license to pass "homosexual laws"—laws imposing special restrictions on gays because they are gay. *See supra* at [1340]; *see also infra* at

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also Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir.1984) (citing without explanation *National Gay Task Force*, *Hatheway*, and *DeSantis* for the proposition that a "classification based on one's choice of sexual partners is not suspect").

[1346-47] (Army regulations do not burden a class defined by behavior subject to criminal sanction). Thus, we find *Padula* unpersuasive.

In sum, we conclude that no federal appellate court has decided the critical issue raised by Watkins' claim: whether persons of homosexual orientation constitute a suspect class under equal protection doctrine. To be sure, *Hardwick, Beller* and *Hatheway* foreclose Watkins from making either a due process or equal protection claim that the Army's regulations impinge on an asserted fundamental right to engage in homosexual sodomy. But Watkins makes no such claim. Rather, he claims only that the Army regulations discriminate against him because of his membership in a disfavored group – homosexuals. This claim is not barred by precedent.

V

We now address the merits of Watkins' claim that we must subject the Army's regulations to strict scrutiny because homosexuals constitute a suspect class under equal protection jurisprudence. The Supreme Court has identified several factors that guide our suspect class inquiry.

The first factor the Supreme Court generally considers is whether the group at issue has suffered a history of purposeful discrimination. *See, e.g., Cleburne*, 473 U.S. at 441, 105 S.Ct at 3255; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566-67, 49 L.Ed.2d 520 (1976); *Rodriguez*, 411 U.S. at 28, 93 S.Ct. at 1294; *Frontiero*, 411 U.S. 677 at 684-85, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583 (1973) (plurality). As the Army concedes,[26] it is indisputable that "homosexuals have historically been the object of pernicious and sustained hostility." *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009,

[26] *See* Army's Second Supplemental Brief at 10.

1014, 105 S.Ct 1373, 1377, 84 L.Ed.2d 393 (1985) (Brennan, J. dissenting from denial of cert.). More recently, Judge Henderson echoed the same harsh truth: "Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society." *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F.Supp. 1361 (N.D. Sal. 1987) (invalidating Defense Department practice of subjecting gay security clearance applicants to more exacting scrutiny than heterosexual applicants). Homosexuals have been the frequent victims of violence and have been excluded from jobs, schools, housing, churches, and even families. *See generally* Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S.Cal.L.Rev. 797, 824-25 (1984) (documenting the history of discrimination). In any case, the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin. *See, e.g., Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3255 (identifying suspect groups).

The second factor that the Supreme Court considers in suspect class analysis is difficult to capsulize and may in fact represent a cluster of factors grouped around a central idea—whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious. Considering this additional factor makes sense. After all, discrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1075 (1980); Note, *supra*, at 814-15 & nn. 115-116. In giving content to this concept of gross unfairness, the Court

has considered (1) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society," *Frontiero,* 411 U.S. at 686, 93 S.Ct. at 1770 (plurality); (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable. *See Cleburne,* 473 U.S. at 440-44, 105 S.Ct. at 3254-56; *Plyler,* 457 U.S. at 216 n. 14, 219 n. 19, 220, 223, 102 S.Ct. at 2394 n. 14, 2396 n. 19, 2396, 2398; *Murgia,* 427 U.S. at 313, 96 S.Ct. at 2567; *Frontiero,* 411 U.S. at 685-87, 93 S.Ct. at 1769-70 (plurality). We consider these questions in turn.

Sexual orientation plainly has no relevance to a person's "ability to perform or contribute to society." Indeed, the Army makes no claim that homosexuality impairs a person's ability to perform military duties. Sergeant Watkins' exemplary record of military service stands as a testament to quite the opposite. *See supra* at 1331, 1332-33. Moreover, as the Army itself concluded, there is not a scintilla of evidence that Watkins' avowed homosexuality "had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." ER at 26c.

This irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes—the second indicia of a classification's gross unfairness. *See Cleburne,* 473 U.S. at 440-41, 105 S.Ct. at 3255. We agree with Justice Brennan that "discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.' " *Rowland,* 470 U.S. at 1014, 105 S.Ct. at 1377 (Brennan, J., dissenting from denial of cert.) (quoting *Plyler,* 457 U.S. at 216 n. 14, 102 S.Ct. at 2394 n. 14). The Army does not dispute the hard fact that homo-

sexuals face enormous prejudice. Nor could it, for the Army justifies its regulations in part by asserting that straight soldiers despise and lack respect for homosexuals and that popular prejudice against homosexuals is so pervasive that their presence in the Army will discourage enlistment and tarnish the Army's public image. *See* Army's Opening Brief at 17-18, 19 n. 9, 30, 30-31 n. 18; Army's Second Supp. Brief at 30-31 & n. 17; AR 635-200, ¶ 15-1(a). Instead, the Army suggests that the public opprobrium directed towards gays does not constitute prejudice in the pejorative sense of the word, but rather represents appropriate public disapproval of persons who engage in immoral behavior. The Army equates homosexuals with sodomists and justifies its regulations as simply reflecting a rational bias against a class of persons who engage in criminal acts of sodomy. In essence, the Army argues that homosexuals, like burglars, cannot form a suspect class because they are criminals.

The Army's argument, essentially adopted by the dissent, rests on two false premises. First, the class burdened by the regulations is defined by the sexual *orientation* of its members, not by their sexual conduct. *See supra* at 1336-39. To our knowledge, homosexual orientation itself has never been criminalized in this country. Moreover, any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems. *See generally Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

Second, little of the homosexual *conduct* covered by the regulations is criminal. The regulations reach many forms of homosexual conduct other than sodomy such as kissing, handholding, caressing, and hand-genital contact. Yet, sodomy is the only consensual adult sexual conduct that Congress has criminalized, 10 U.S.C. § 925. Indeed, the Army points to no law, federal or state, which crim-

inalizes any form of private consensual homosexual behavior other than sodomy. The Army's argument that its regulations legitimately discriminate solely against criminals might be relevant if the class at issue were limited to sodomists. But the class banned from Army service is not composed of sodomists, or even of homosexual sodomists; the class is composed of persons of homosexual orientation whether or not they have engaged in sodomy. As the record in this case makes clear, the Army has no proof that Watkins has ever engaged in any act of sodomy—homosexual or heterosexual. *See supra* at 1332-33 & n. 2. Nonetheless, the regulations mandated his discharge and the denial of his reenlistment application.

Finally, we turn to immutability as an indicator of gross unfairness. The Supreme Court has never held that only classes with immutable traits can be deemed suspect. *Cf., e.g., Cleburne,* 473 U.S. at 442 n. 10, 105 S.Ct. at 3256, n. 10 (casting doubt on immutability theory); *id.* at 440-41, 105 S.Ct. at 3255 (stating the defining characteristics of suspect classes without mentioning immutability); *Murgia,* 427 U.S. at 313, 96 S.Ct. at 2566-67 (same); *Rodriguez,* 411 U.S. at 28, 93 S.Ct. at 1294 (same). We nonetheless consider immutability because the Supreme Court has often focused on immutability, *see, e.g., Plyler,* 457 U.S. at 220, 102 S.Ct. at 2396; *Frontiero,* 411 U.S. at 686, 93 S.Ct. at 1770 (plurality), and has sometimes described the recognized suspect classes as having immutable traits, *see, e.g., Parham v. Hughes,* 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979) (plurality opinion) (describing race, national origin, alienage, illegitimacy, and gender as immutable).

Although the Supreme Court considers immutability relevant, it is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask

the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes "pass" for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. *See* J. Griffin, Black Like Me (1977). At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, "immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment. *See* Tribe, *supra,* at 1073-74 n. 52. *See generally* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 Harv.L.Rev. 1285, 1303 (arguing that the ability to change a trait is not as important as whether the trait is a "determinative feature of personality").

Under either formulation, we have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. *See* Note, *supra,* 57 S.Cal.L.Rev. at 817-821 (collecting sources); *see also* L. Tribe, *supra* note 20, at 945 n. 17. Scientific proof aside, it

seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. *See* L. Tribe, *supra* note 23, at 945 n. 17. *But see* Note, *supra,* 57 S.Cal.L. Rev. at 820-21 & nn. 147-149. But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes. To express the same idea under the alternative formulation, we conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.

The final factor the Supreme Court considers in suspect class analysis is whether the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government. *See, e.g., Cleburne,* 473 U.S. at 441, 105 S.Ct. at 3255; *Plyler,* 457 U.S. at 216 n. 14, 102 S.Ct. at 2394 n. 14; *Rodriguez,* 411 U.S. at 28, 93 S.Ct. at 1294. Courts understandably have been more reluctant to extend heightened protection under equal protection doctrine to groups fully capable of securing their rights through the political process. In evaluating whether a class is politically underrepresented, the Supreme Court has focused on whether the class is a "discrete and insular minority." *See, e.g., Murgia,* 427 U.S. at 313, 96 S.Ct. at 2567; *Examining Board v. Flores de Otero,* 426 U.S. 572, 602, 96 S.Ct. 2264, 2281, 49 L.ed.2d 65 (1976); *see generally United*

States v. Carolene Products, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938).

The Court has held, for example, that old age does not define a discrete and insular group because "it marks a stage that each of us will reach if we live out our normal span." *Murgia,* 427 U.S. at 313-14, 96 S.Ct. at 2567. By contrast, most of us are not likely to identify ourselves as homosexual at any time in our lives. Thus, many of us, including many elected officials, are likely to have difficulty understanding or empathizing with homosexuals. Most people have little exposure to gays, both because they rarely encounter gays[27] and because the gays they do encounter may feel compelled to conceal their sexual orientation. In fact, the social, economic, and political pressures to conceal one's homosexuality commonly deter many gays from openly advocating pro-homosexual legislation, thus intensifying their inability to make effective use of the political process. *Cf.* J. Ely, *supra* note 21, at 163-64. "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland,* 470 U.S. at 1014, 105 S.Ct. at 1377 (Brennan, J., dissenting from denial of cert.)[28]

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[27] Because homosexuals are a minority and are frequently excluded from jobs, schoos, churches, and heterosexual social circles, *see supra* at 1346, heterosexuals generally have relatively few opportunities to meet homosexuals and overcome any prejudices against homosexuality.

[28] *See also Adolph Coors Co. v. Wallace,* 570 F.Supp. 202, 209 n. 24 (N.D.Cal.1983)("Homosexuals attempting to form associations to represent their political and social beliefs, free from fatal reprisals for their sexual orientation" constitute discrete and insular minority meriting special protection under *U.S. v. Carolene Products Co.,* 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n.4, 82 L.Ed. 1234 (1938) (Williams, J.)).

Even when gays overcome this prejudice enough to participate openly in politics, the general animus towards homosexuality may render this participation wholly ineffective. Elected officials sensitive to public prejudice may refuse to support legislation that even appears to condone homosexuality. *See* Note, *supra,* 98 Harv.L.Rev. at 1304 n.96. Indeed, the Army itself argues that its regulations are justified by the need to "maintain the public acceptability of military service," AR 635-200, ¶ 15-2(a), because "toleration of homosexual conduct . . . might be understood as tacit approval" and "the existence of homosexual units might well be a source of ridicule and notoriety." Army's Opening Brief at 17, 19 n. 9, 30-31 n. 18. These barriers to political power are underscored by the underrepresentation of avowed homosexuals in the decisionmaking bodies of government and the inability of homosexuals to prevent legislation hostile to their group interests.[29] *See Frontiero,* 411 U.S. at 686 & n. 17, 93 S.Ct. at 1770 & n. 17 (plurality) (underrepresentation of women in government caused in part by history of dis-

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[29] The Army claims that homosexuals cannot be politically powerless because two states, Wisconsin and California, have passed statutes prohibiting discrimination against homosexuals. Two state statutes do not overcome the long and extensive history of laws discriminating against homosexuals in all fifty states. *See, e.g.,* Note, *supra,* 57 S.Cal.L.Rev. at 803-07. Moreover, at the national level – the relevant political level for seeking protection from military discrimination – homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination.

The Army also argues that the repeal of sodomy statutes by many states proves that homosexuals are not politically powerless. However, sodomy statutes restrict the sexual freedom of heterosexuals as well as homosexuals. The repeal of sodomy statutes may thus reflect the liberalization of attitudes about heterosexual behavior more than it reflects the political power of homosexuals.

crimination); *Cleburne,* 473 U.S. at 445, 105 S.Ct. at 3257 (reasoning that the existence of legislation responsive to the needs of the mentally disabled belied the claim that they were politically powerless).

In sum, our analysis of the relevant factors in determining whether a given group should be considered a suspect class for the purposes of equal protection doctrine ineluctably leads us to the conclusion that homosexuals constitute such a suspect class. We find not only that our analysis of each of the relevant factors supports our conclusion, but also that the principles underlying equal protection doctrine—the principles that gave rise to these factors in the first place—compel us to conclude that homosexuals constitute a suspect class. *See also* J. Ely, *supra* note 21, at 162-64 (classifications based on homosexuality merit heightened scrutiny); L. Tribe, supra note 23, at 944-45 n. 17 (same).

VI

Having concluded that homosexuals constitute a suspect class, we must subject the Army's regulations facially discriminating against homosexuals to strict scrutiny. Consequently, we may uphold the regulations only if " '*necessary* to promote a *compelling* governmental interest.' " *Dunn v. Blumstein,* 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972) (quoting *Shapiro,* 394 U.S. at 634, 89 S.Ct. at 1331); *see also University of Calif. Regents v. Bakke,* 438 U.S. 265, 357, 98 S.Ct. 2733, 2782, 57 L.Ed.2d 750 (1978) (Opinion of Brennan, White, Marshall & Blackmun, JJ.). The requirement of necessity means that no less restrictive alternative is available to promote the compelling governmental interest. *See Dunn,* 405 U.S. at 343, 92 S.Ct. at 1003; *Bakke,* 438 U.S. at 357, 98 S.Ct. at 2782 (Opinion of four justices).

We recognize that even under strict scrutiny, our review of military regulations must be more deferential than comparable review of laws governing civilians. *See Goldman v. Weinberger,* 475 U.S. 503, 106 S. Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). While the Supreme Court does not "purport to apply a different equal protection test because of the military context, [it does] stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance." *Rostker v. Goldberg,* 453 U.S. 57, 71, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981) (citing *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975)). We question whether this special deference is appropriate in Watkins' case given that Congress has chosen not to regulate homosexuality or any form of sexual conduct engaged in by military personnel save for one exception—Congress has chosen to criminalize sodomy by military personnel whether committed "with another person *of the same or opposite* sex." 10 U.S.C. § 925 (emphasis added). Hence, if anything, section 925 reflects an absence of congressional intent to discriminate on the basis of sexual orientation.

In any case, even granting special deference to the policy choices of the military, we must reject many of the Army's asserted justifications because they illegitimately cater to private biases. For example, the Army argues that it has a valid interest in maintaining morale and discipline by avoiding hostilities and " 'tensions between known homosexuals and other members [of the armed services] who despise/detest homosexuality.' " Army's Opening Brief at 17 (quoting and incorporating into their argument *Beller,* 632 F.2d at 811); *see also id.* at 17-18, 19 n. 9, 30, 30-31 n. 18; Army's Second Supp. Brief at 30-31 & n. 17;

AR 635-200, § 15-1(a).[30] The Army also expresses its " 'doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands' " because many lower-ranked heterosexual soldiers despise and detest homosexuality. *See* Army's Second Supp. Brief at 30-31 (quoting and incorporating *Beller,* 632 F.2d at 811); *see also id.* at 31 n. 17; Army's Opening Brief at 17-18, 19 n. 9, 30; AR 635-200, ¶ 15-1(a). Finally, the Army argues that the presence of gays in its ranks "might well be a source of ridicule and notoriety, harmful to the Army's recruitment efforts" and to its

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[30] A somewhat different rationale conceivably could also underlie certain cryptic statements the Army makes about its concerns regarding "close conditions affording minimal privacy," " 'potential for difficulties arising out of possible close confinement,' " and "the intimacy of barrack's life." AR 635-200, ¶15-1(a); Army's Opening Brief at 15 (quoting *Beller,* 632 F.2d at 812); Army's Second Supp. Brief at 19 n.9, 30. Conceivably, the Army could be concerned in part that the presence of gays in the ranks will create *sexual* tensions—as distinguished from tensions arising from prejudice—because of the pratical necessity of housing gays with personnel of the same sex. The Army, however, never articulates this concern. Thus it gives no indication that it regards this concern as compelling or that it believes that weeding *all* homosexuals out of the military—even soldiers as exemplary as Sergeant Watkins—is necessary to advance a compelling military interest in reducing sexual tensions. Indeed, at points in its argument the Army implies that it is concerned about the close confinement of soldiers only insofar as such confinement might exacerbate hostilities and tensions assertedly created by the prejudice some heterosexuals have against homosexuals. *See*Army's Opening Brief at 17, 31 n. 18. Even if the Army had raised the argument that excluding homosexuals from barracks reduces sexual tension and had shown that reducing sexual tension serves a compelling interest, nothing in the record even suggests that a per se rule banning all homosexuals from the Army would be the least restrictive method of advancing this interest.

public image. Army's Opening Brief at 31 n. 18; *see also id.* at 15, 17, 19 n. 9, 30; AR 635-200, ¶ 15-1(a).[31]

These concerns strike a familiar chord. For much of our history, the military's fear of racial tension kept black soldiers separated from whites. *benShalom v. Secretary of the Army,* 489 F.Supp. 964, 976 (E.D.Wis.1980). As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale. *See* G. Ware, William Hastie: Grace Under Pressure 99, 134 (1984).[32] Today, it is unthinkable that the judiciary would defer to the Army's prior "professional" judgment that black and white soldiers had to be segregated to avoid interracial tensions. Indeed, the Supreme Court has decisively rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those private prejudices create real and legitimate problems. *See Palmore V.*

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[31] *Goldman* and *Rostker* do not, as the dissent suggests, require us to be so deferential to the military that even under strict scrutiny we cannot overturn the " 'considered professional judgment' of the Army as to what kind of persons should be barred from enlisting to insure a disciplined fighting force." *Id.* at 18. This cannot be the law. If the military decided to exclude blacks from its ranks because their presence allegedly undermined morale, the judiciary would be helpless to strike down the action. *Goldman* and *Rostker* require judicial deference, not the abdication of our Article III duty to hold the other branches of government, even the military, accountable to the Constitution.

[32] It took an Executive Order in 1945 by President Truman, issued against the advice of almost every admiral and general, to integrate our armed forces. M. Miller, *Plain Speaking: An Oral Biography of Harry S. Truman 79* (1983). It is also interesting to note that during World War II the Army deliberately minimized any publicity about the existence of black soldiers because it feared that such publicity would tarnish the Army's public image. *See* G. Ware, *supra,* at 100.

Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

In *Palmore,* a state granted custody of a child to her father because her white mother had remarried a black man. The state rested its decision on the best interests of the child, reasoning that, despite improvements in race relations, the social reality was that the child would likely suffer social stigmatization if she had parents of different races. A unanimous Court, in an opinion by Chief Justice Burger, conceded the importance of the state's interest in the welfare of the child, but nonetheless reversed with the following reasoning:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. . . . The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. at 433, 104 S.Ct. at 1882. Thus, *Palmore* forecloses the Army from justifying its ban on homosexuals on the ground that private prejudice against homosexuals would somehow undermine the strength of our armed forces if homosexuals were permitted to serve. *See also Cleburne,* 473 U.S. at 448, 105 S.Ct. at 3259 (even under rationality review of discrimination against group that is neither

suspect nor quasi-suspect, catering to private prejudice is not a cognizable state interest).[33]

The Army's defense of its regulations however, goes beyond its professed fear of prejudice in the ranks. Apparently, the Army believes that its regulations rooting out persons with certain sexual tendencies are not merely a response to prejudice, but are also grounded in legitimate moral norms. In other words, the Army believes that its ban against homosexuals simply codifies society's moral consensus that homosexuality is evil. Yet, even accepting *arguendo* this proposition that anti-homosexual animus is grounded in morality (as opposed to prejudice masking as morality), equal protection doctrine does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against suspect classes.

A similar principle animates *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), in which the Supreme Court struck down a Virginia statute outlawing marriages between whites and blacks. Although the Virginia legislature may have adopted this law in the sincere belief that miscegenation—the mixing of racial blood lines—was evil, this moral judgment could not justify the statute's discrimination on the basis of race.

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[33] According to the dissent, our decisions in *Beller* and *Hatheway* preclude us from rejecting the Army's purported justifications as illegitimate. "*Beller* and *Hatheway,*" the dissent contends, "both approve discriminatory treatment against homosexuals, by the military, which is based on moral judgments regarding homosexuality and homosexual conduct." *Dissent* at 1360. To the extent that these cases countenance rationales based on prejudice such as potentional tension between homosexuals and soldiers who detest homosexuality or the potential adverse impact of homosexual soldiers on military recruiting, *Beller* and *Hatheway* are undermined by both *Palmore* and *Cleburne*—subsequent Supreme Court decisions.

Like the Army's regulations proscribing sexual acts only when committed by homosexual couples, the Virginia statute proscribed marriage only when undertaken by mixed-race couples. In both cases, the government did not prohibit certain conduct, it prohibited certain conduct selectively—only when engaged in by certain classes of people. Although courts may sometimes have to accept society's moral condemnation as a justification even when the morally condemned activity causes no harm to interests outside notions of morality, *see Hardwick*, 106 S.Ct. at 2846 (accepting moral condemnation as justification under rationality review), our deference to majoritarian notions of morality must be tempered by equal protection principles which require that those notions be applied evenhandedly. Laws that limit the acceptable focus of one's sexual desires to members of the opposite sex, like laws that limit one's choice of spouse (or sexual partner) to members of the same race, cannot withstand constitutional scrutiny absent a compelling governmental justification. This requirement would be reduced to a nullity if the government's assertion of moral objections only to interracial couples or only to homosexual couples could itself serve as a tautological basis for the challenged classification.

The Army's remaining justifications for discriminating against homosexuals may not be illegitimate, but they bear little relation to the regulations at issue. For example, the Army argues that military discipline might be undermined if emotional relationships developed between homosexuals of different military rank. Army's Opening Brief at 17-18, 19 n. 9, 30; AR 635-200, ¶ 15-1(a). Although this concern might be a compelling and legitimate military interest, the Army's regulations are poorly tailored to advance that interest. No one would suggest that heterosexuals are any less likely to develop emotional attachments within

military ranks than homosexuals. Yet the Army's regulations do not address the problem of emotional attachments between male and female personnel, which presumably place similar stress on military dicipline. Surely, the Army's interest in preventing emotional relationships that could erode military discipline would be advanced much more directly by a ban on all sexual contact between members of the same unit, whether between persons of the same or opposite sex. *Cf. Cleburne,* 473 U.S. at 449-50, 105 S.Ct. at 3259-60 (rejecting certain asserted justifications under *rationality* review where the justification would extend to other groups but the challenged classifications did not). Here the Army regulations disqualify all homosexuals whether or not they have developed any emotional or sexual liaisons with other soldiers.

Also bearing little relation to the regulations is the Army's professed concern with breaches of security. AR 635-200, ¶ 15-1(a). Certainly the Army has a compelling interest in excluding persons who may be susceptible to blackmail. It is evident, however, that homosexuality poses a special risk of blackmail only if a homosexual is secretive about his or her sexual orientation. The Army regulations do nothing to lessen this problem. Quite the opposite, the regulations ban homosexuals only after they have declared their homosexuality or have engaged in known homosexual acts. The Army's concern about security risks among gays could be addressed in a more sensible and less restrictive manner by adopting a regulation banning only those gays who had lied about or failed to admit their sexual orientation.[34] In that way, the Army

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[34] Watkins has forthrightly reported his homosexuality since his induction in 1967, and his homosexuality was always a matter of common knowledge. *See supra* at 1331-32. There is no suggestion in the

would *encourage*, rather than discourage, declarations of homosexuality, thereby reducing the number of closet homosexuals who might indeed pose a security risk.[35]

CONCLUSION

We hold that the Army's regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation, a suspect class, and because the regulations are not necessary to promote a legitimate compelling governmental interest. We thus reverse the district court's rulings denying Watkins' motion for summary judgment and granting summary judgment in favor of the Army, and remand with instructions to enter a declaratory judgment that the Army Regulations AR 635-200, Chapter 15, and 601-280, ¶ 2-21(c), are constitutionally void on their face, and to enter an injunction requiring the Army to consider Watkins' reenlistment application without regard to his sexual orientation. The district court shall also consider any unresolved claims of Watkins' such as whether the Army acted unlawfully in revoking his security clearance.

REVERSED AND REMANDED.

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record before us that Watkins ever feared public disclosure of his homosexuality.

[35] Moreover, even if banning homosexuals could lessen security risks, there appears to be no reason for treating homosexuality as a nonwaival be disqualification from military service while treating other more serious potential sources of blackmail as waivable disqualifications. *See* AR 635-200, ¶ 14-12(c) & (d) (making drug abuse and the commission of other serious military offenses waivable disqualifications).

REINHARDT, Circuit Judge, dissenting.

With great reluctance, I have concluded that I am unable to concur in the majority opinion.[1] Like the majority, I believe that homosexuals have been unfairly treated both historically and in the United States today. Were I free to apply my own view of the meaning of the Constitution and in that light to pass upon the validity of the Army's regulations, I too would conclude that the Army may not refuse to enlist homosexuals. I am bound, however, as a circuit judge to apply the Constitution as it has been interpreted by the Supreme Court and our own circuit, whether or not I agree with those interpretations. Because of this requirement, I am sometimes compelled to reach a result I believe to be contrary to the proper interpretation of constitutional principles. This is, regrettably, one of those times.

I.

In this case we consider the constitutionality of a regulation which bars homosexuals from enlisting in the Army. Sergeant Perry Watkins challenges that regulation under the Equal Protection Clause. The majority holds that

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[1] The original majority opinion and dissent were formerly reported at 837 F.2d 1428. In its Petition for Rehearing, the Government pointed out that Watkins admitted to having engaged in homosexual sodomy with other servicemen while in the Army. The panel had previously been under the impression that Watkins had committed only "unspecified" homosexual acts. The majority has chosen to amend its opinion to reflect the information the government called to our attention, and to make several changes in the text of the opinion. Because the case has been taken en banc and a new opinion will be issued for the court, I see no purpose in my making parallel changes in the dissent. Instead, I simply observe that Wakin's admissions make the applicability of *Hatheway*, *Hardwick* and the Army's regulations even more appropriate than I had previously thought.

homosexuals are a suspect class, and that the regulation cannot survive strict scrutiny. Because I am compelled by recent Supreme Court and Ninth Circuit precedent to conclude first, that homosexuals are not a suspect class and second, that the regulation survives both rational and intermediate level scrutiny, I must dissent.

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), is the landmark case involving homosexual conduct. In *Hardwick*, the Supreme Court decided that homosexual sodomy is not protected by the right to privacy, and thus that the states are free to criminalize that conduct. Because Hardwick did not challenge the Georgia sodomy statute under the Equal Protection Clause, and neither party presented that issue in its briefs or at oral argument, the Court limited its holding to due process and properly refrained from reaching any direct conclusion regarding an equal protection challenge to the statute.[2] *See id.* 106 S.Ct. at 2846 n. 8. However, the fact that *Hardwick* does not address the equal protection question directly does not mean that the case is not of substantial significance to such an inquiry.

An important part of the function of circuit court judges is to interpret the Supreme Court's opinions. In

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[2] *Cf.* L. Tribe, *American Constitutional Law* § 15-21, at 1431 n. 7 (2nd ed. 1988) [hereinafter, *Constitutional Law*]:

> *The Hardwick* majority's notation that no equal protection issue was before the Court should not be taken to mean that the Justices would have been interested in resolving it if it had been. For the Court denied *certiorari* that same term in *Baker v. Wade*, 769 F.2d 289 (5th Cir.1985) (en banc), *rehearing en banc denied*, 774 F.2d 1285 (5th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986), which involved a Texas law . . . that targeted only homosexual acts.

In his treatise, Professor Tribe notes, in the interest of full disclosure, that he served as Hardwick's counsel before the Supreme Court.

doing so, we must attempt to understand the principles underlying those opinions, so that we may determine how past decisions affect subsequent cases. With respect to *Hardwick,* the majority balks at performing this task. Instead, it states: "the *Hardwick* Court simply did not address either the question whether heterosexual sodomy also falls outside the scope of the right to privacy or the separate question whether homosexual but not heterosexual sodomy may be criminalized without violating the equal protection clause." Maj. op. at 1340. The duty to interpret Supreme Court precedent cannot be so easily avoided. Logic and reason are among the tools available to judges who wish to determine the meaning of cases.

The answer to the meaning of *Hardwick* is not difficult to find. There are only two choices: either *Hardwick* is about "sodomy", and heterosexual sodomy is as constitutionally unprotected as homosexual sodomy, or it is about "homosexuality", and there are some acts which are protected if done by heterosexuals but not if done by homosexuals. In applying the opinion to future cases our first effort must be to decide which of the two propositions *Hardwick* stands for.[3] Although the majority refuses to acknowledge that it is making a choice, there can be no doubt that it does so. The sentence after the text quoted above reads: "We cannot read *Hardwick* as standing for the proposition that government may outlaw sodomy only when comitted by a disfavored class of persons.' "[4] Maj.

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[3] Ultimately, as far as the case before us is concerned, the result is the same regardless of which choice we make. *See* note 11, *infra.* However, the analysis by which we reach that result differs substantially.

[4] *But see Baker v. Wade, supra* note 2, where the Fifth Circuit, sitting en banc, considered and rejected the claims that homosexuals are a suspect class and that a statute that criminalized homosexual sodomy but not heterosexual sodomy violates equal protection.

op. at 1340. By expressly rejecting the "homosexuality" option, the majority implicitly but necessarily selects the "sodomy" alternative. I do not believe that *Hardwick* can reasonably be so construed.

In my opinion, *Hardwick must* be read as standing precisely for the proposition the majority rejects. To put it simply, I believe that after *Hardwick* the government may outlaw homosexual sodomy even though it fails to regulate the private sexual conduct of heterosexuals. In *Hardwick* the Court took great care to make clear that it was saying only that *homosexual* sodomy is not constitutionally protected, and not that all sexual acts—both heterosexual and homosexual—that fall within the definition of sodomy can be prohibited.

The Georgia statute at issue in *Hardwick* on its face barred all acts of sodomy. The Court could simply have upheld the statute without even mentioning the word "homosexual". Instead it carefully crafted its opinion to proscribe and condemn only *homosexual* sodomy. While it can be argued that the Court was faced with only a homosexual sodomy case, under the majority's theory the fact that the particular act of sodomy was homosexual in nature is of no significance. According to the majority, the race and sexual preference of the defendant are equally irrelevant. The majority says: "Surely, for example, *Hardwick* cannot be read as a license to outlaw sodomy only when committed by blacks." Maj. op. at 1340. Surely not. And surely, had Hardwick been black rather than a homosexual, the Court would not, throughout its opinion, have written about "black sodomy" or black sodomists. It would simply have written about sodomy. Here, however, from the Court's standpoint the crucial fact was that Hardwick was a homosexual. For that reason, throughout its opinion the Court wrote about "homosexual sodomy".

It is significant that whatever one may think of the soundness of *Hardwick*'s assumptions or conclusions, the decision came as no surprise to those familiar with the rulings of the lower federal courts on the subject of homosexual rights. Well before *Hardwick*, this court, along with most other federal courts, had concluded that the Supreme Court had determined that the right to privacy was inapplicable to homosexual conduct. As we said in *Beller v. Middendorf*, 632 F.2d 788, 809-10 (9th Cir. 1980), "most federal courts . . . have understood the holding [in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976)] to be that homosexual conduct does not enjoy special constitutional protection under the due process clause."

The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear. A prominent constitutional scholar makes this point succinctly. Professor Laurence Tribe, after strongly criticizing the Court's holding and reasoning in *Hardwick*, states that the " 'good news' about the Court's decision" is that it was so clearly bsaed on prejudice against homosexuals that it "amy therefore pose less of a threat to other privacy precedents than would otherwise be the case." *Constitutional Law*, *supra*, § 15-21, at 1430. Justice Blackmun characterized the decision as being "obsessively focus[ed] on homosexual activity", and "proceed[ing] on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of . . . other citizens." *Hardwick*, 106 S.Ct. at 2849 (Blackmun, J., dissenting). Indeed, it is hard to find any basis in the Court's opinion for interpreting it the way the majority chooses: the Court says explicitly that the statute is justified by "majority sen-

timents about homosexuality", 106 S.Ct. at 2846, not by "majority sentiments about sodomy".

My colleagues' interpretation of *Hardwick* is not only unsound, it also unnecessarily and incorrect increases—exponentially—the damage to the right to privacy caused by *Hardwick*. While in *Hardwick* the Court made it clear that homosexual conduct is not protected by the right to privacy, the Court has never held that the government has the authority to regulate the private heterosexual acts of consenting adults. *See Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *see also Hardwick*, 106 S.Ct. at 2857-58 (Stevens, J., dissenting). To the contrary, it has expressly stated that "intimate relationships" (though apparently only of the heterosexual variety) are constitutionally protected. See *Board of Directors of Rotary International v. Rotary Club*, __ U.S. __, 107 S.Ct. 1940, 1945, 95 L.Ed.2d 474 (1987). Reading *Hardwick* as implicitly permitting the regulation of heterosexual conduct, as the majority's analysis forces it to do, constitutes a serious retreat in the privacy area.[5] If the

[5] The majority's disingenuous statement that it reads *Hardwick* neither one way nor the other on this point, maj. op. at 1340 n. 20, is simply neither logical nor credible. Only if heterosexual sodomy is *not* protected by the right to privacy could the majority's equal protection argument conceivably have any validity. If the right to privacy does apply in the case of heterosexuals who, for example, engage in oral sex, then the equal protection clause obviously does not require equal treatment of homosexual and heterosexual sexual conduct. The clause is procedural in nature and cannot afford substantive rights to a particular group when the Constitution does not otherwise provide them. To put it differently, if one group's sexual conduct is protected by the right to privacy and the other's is not, it is the Constitution itself that

majority's interpretation of *Hardwick* were correct, states could, for example, criminalize the act of oral sex when engaged in by heterosexuals, including married couples, and in fact would be required to do so if they wished to criminalize homosexual sodomy. Moreover, states would be required to enforce these statutes equally, against heterosexuals and homosexuals alike,[6] a practice not heretofore common in our society. I view the Constitution differently than the majority apparently does: I believe the Constitution protects most, if not all, private heterosexual acts between consenting adults.

The majority opinion undermines the right to privacy in another way. In its eagerness to promote its equal protection analysis and to bolster its characterization of *Hardwick* as an anti-privacy decision, it terms equal protection more objective and more democratic than substantive due process, which it describes as "value-based line-drawing" arising not from the Constitution itself but from "judicial fiat". Maj. op. at 1341. It is not necessary to denigrate the right to privacy in order to appreciate the importance of the equal protection clause. The majority's attack on

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distinguishes between the treatment the two groups constitutionally receive. We cannot, then, use the equal protection clause to say that the two groups must be treated identically with respect to that conduct. Since the Court has already held that homosexuals are not protected by the privacy provisions of the Constitution when they commit sodomy, the right to equal treatment exists only if heterosexuals are similarly unprotected. Thus the majority's argument that equal protection applies is *necessarily* premised on the view that heterosexual sodomy, including oral sex between married couples, is not protected by the right to privacy and may be criminalized.

[6] *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

substantive due process is unreasoned and unjustified.* As the Supreme Court has made clear on numerous occasions, the right to privacy is a fundamental part of our constitutional protections, originating in the First, Third, Fourth, Fifth, and Ninth Amendments, and of course the due process clause of the Fourteenth Amendment. *See, e.g., Griswold v. Connecticut,* 381 U.S. at 484-85, 85 S.Ct. at 1681-82. The protections guaranteed by the right to privacy are no less central to the Constitution than those guaranteed by the equal protection clause. *See generally* Note, "Process, Privacy, and the Supreme Court", 28 *B.C. L.Rev.* 691 (1987). Also, notwithstanding the views of Dean Ely, *see* maj. op. at 1341 ns. 21, 22, most commentators agree that equal protection analysis is no more objective and no less difficult to apply than substantive due process analysis. *See, e.g.,* Tribe, "The Puzzling Persistence of Process-Based Constitutional Theory", 89 *Yale. L.J.* 1063 (1980); Westen, "The Empty Idea of Equality", 95 *Harv. L.Rev.* 537 (1982). Unlike the majority, I believe we should afford both these fundamental constitutional protections full and equal dignity.

II.

The majority opinion concludes that under the criteria established by equal protection case law, homosexuals must be treated as a suspect class. Maj. op. at 1345-47. Were it not for *Hardwick* (and other cases discussed *infra*), I would agree, for in my opinion the group meets all the applicable criteria. *See, e.g.,* Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification", 98 *Harv.L.Rev.* 1285 (1985).

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* That Dean John Hart, Ely has "severely criticized" *Roe* v. *Wade,* maj. op. at 1341 n.21, makes the majority's position no more persuasive and *Roe* v. *Wade* no less binding or important a constitutional decision.

However, after *Hardwick*, we are no longer free to reach that conclusion.[8]

The majority opinion treats as a suspect class a group of persons whose defining characteristic is their desire, predisposition, or propensity to engage in conduct that the Supreme Court has held to be constitutionally unprotected, an act that the states can—and approximately half the states have[9]—criminalized.[10] Homosexuals are different from groups previously afforded protection under the equal protection clause in that homosexuals are defined by their conduct—or, at the least, by their desire to engage in certain conduct. With other groups, such as blacks or women, there is no connection between particular conduct and the definition of the group. When conduct that plays a central role in defining a group may be prohibited by the state, it cannot be asserted with any

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[8] *See Constitutional Law, supra,* § 16-33, at 1616 n. 47:

> The fact that the Court in *Bowers v. Hardwick,* 106 S.Ct. 2841 (1986), went out of its way to create a line between heterosexuals and homosexuals, where there was none in the challenged sodomy statute, merely to preserve prosecution of homosexuals under the law from constitutional infirmity, indicates how unlikely it is that homosexuality will be deemed quasi-suspect in the near future. *But compare Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), *with Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed 256 (1896).

I note that Professor Tribe's pessimistic forecast relates to intermediate scrutiny and not the even stricter standard that the majority today holds applicable.

[9] *See Hardwick,* 106 S.Ct. at 2845.

[10] *Cf. Plyler v. Doe,* 457 U.S. 202, 219 n. 19, 102 S.Ct. 2382, 2396 n. 19, 72 L. Ed 2d 786 (1982) (rejecting the claim that illegal aliens are a suspect class, in part because the defining element of the class is a criminal act).

legitimacy that the group is specially protected by the Constitution.[11]

Sodomy is an act basic to homosexuality. In the relevant state statutes, sodomy is usually defined broadly to include "any sexual act involving the sex organs of one person and the mouth or anus of aonother." *See, e.g., Hardwick,* 106 S.Ct. at 2842 n. 1. The practices covered by this definition are, not surprisingly, the most common sexual practices of homosexuals. Specifically, oral sex is the primary form of homosexual activity. *See* A. Bell & M. Weinberg, *Homosexualities* 106-11, 327-30 (1978). When the Supreme Court declares that an act that is done by a vast majority of a group's members and is fundamental to their very nature can be criminalized and further states that the basis for such criminalization is "the presumed belief of a majority of the electorate . . . that [the practice] is immoral and unacceptable"[12], I do not think that we are free, whatever our personal views, to describe discriminatory treatment of the group as based on "unreasoning prejudice". *See* maj. op. at 1345-46. Rather we are obligated to accept the Supreme Court's conclusion that what the majority of this panel calls "unreasoning prejudice" is instead a permissible societal moral judgment.

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[11] Thus, it is not even necessary to decide whether the majority's view of *Hardwick*—that it is based on a condemnation of sodomy rather than of homosexuality—is correct. Whatever the explanation for the Court's willingness to allow sodomy to be criminalized—whether its decision is based on its views as to the morality of homosexuality or on its disapproval of sodomy, including the heterosexual variety—that willingness is inconsistent with affording special constitutional protection to homosexuals—a group whose primary form of sexual activity, the Court tells us, may be declared criminal.

[12] *Hardwick,* 106 S.Ct. at 2846.

I have already explained the principal reasons why the majority's interpretation of *Hardwick* as covering heterosexual sodomy is not only incorrect but also damaging to constitutional principles. I must now add that the majority errs for another important reason. The majority states that the equal protection clause requires the government (if it wishes to criminalize homosexual sodomy) to prohibit all persons from engaging in "the proscribed sexual acts". Maj. op. at 1340. This analysis affords equal treatment only in the most superficial meaning of the term. Government actions, neutral on their face, can sometimes have distinctly unequal effects, and carry implicit statements of inequality. *See* L. Tribe, *Constitutional Choices,* 238-45 (1985). Laws against sodomy do not affect homosexuals and heterosexuals equally. Homosexuals are more heavily burdened by such legislation, even if we ignore the governmental tendence to prosecute general sodomy statutes selectively against them. *See Hardwick,* 106 S.Ct. 2850 n. 2 (Blackmun, J., dissenting). Oral sex, a form of sodomy, is the primary form of sexual activity among homosexuals; however, sexual intercourse is the primary form of sexual activity among heterosexuals.[13] If homosexuals were in fact a suspect class, a statute criminalizing both heterosexual sodomy and homosexual sodomy would still not survive equal protection analysis. For the prohibition to be equal, the government would have to prohibit sexual intercourse—conduct as basic to heterosexuals as sodomy is to homosexuals.[14] This, obviously, the govern-

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[13] Oral sex, though practiced by a substantial majority of heterosexuals, is not the primary sexual activity of that group. *See* W. Masters, V. Johnson & R. Kolodny, *Human Sexuality* 388-92, 418-22 (2nd ed. 1985).

[14] Statutes which are neutral on their face survive equal protection scrutiny unless they are the product of discriminatory intent.

ment would not and could not do. Therefore, if equal protection rules apply (i.e., if homosexuals are a suspect class), a ban on homosexual sodomy could not stand no matter how the statute was drawn. *Hardwick* makes it plain that the contrary is true.

Finally, the "protection" of homosexual rights provided by the majority opinion is hollow indeed. The majority unwittingly denigrates the equal protection clause as well as the right to privacy. Until now, a "suspect class" has been a group whose members were afforded special solicitude. That is patently not the case with respec to homosexuals. Many states deny that group the right to engage in their most fundamental form of sexual activity. A "life without any physical intimacy," *Hardwick*, 106 S.Ct at 2850 n.2 (Blackmun, J., dissenting), is hardly the life contemplated for our citizens by the Declaration of Independence ("the pursuit of happiness") or, one would have thought, by the Constitution. While *Hardwick* may not wholly preclude the possibility of lawful physical intimacy for homosexuals, it drastically limits that right. To proclaim that under these circumstances homosexuals are afforded special protection by the Constitution would be hypocritical at best.

Before concluding my discussion of *Hardwick*, I wish to record my own view of the opinion. I have delayed doing so until I have applied the case as I believe we have a duty to apply it. Now, I must add that as I understand our Constitution, a state simply has no business treating any group of persons as the State of Georgia and other states with sodomy statutes treat homosexuals. In my opinion, invidious discrimination against a group of persons with immutable characteristics can never by justified on the grounds of society's moral disapproval. No lesson regarding the meaning of our Constitution could be more important for us as a nation to learn. I believe that the Supreme

Court egregiously misinterpreted the Constitution in *Hardwick*. In my view, *Hardwick* improperly condones official bias and prejudice against homosexuals, and authorizes the criminalization of conduct that is an essential part of the intimate sexual life of our many homosexual citizens, a group that has historically been the victim of unfair and irrational treatment. I believe that history will view *Hardwick* much as it views *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1986). And I am confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court. *See Hardwick*, 106 S.Ct. at 2856 (Blackmun, J., dissenting).

The decision in *Hardwick* has not affected my firm belief that the Constitution, properly interpreted, does afford homosexuals the same protections it affords other groups that are historic victims of individious discrimination. Nevertheless, for the reasons I have already stated, it is my obligation to follow *Hardwick* as long as it has precedential force—and for now it does.

III.

Even if the majority's analysis could survive *Hardwick*, we would be precluded by our own circuit precedent from concluding that homosexuals are a suspect class. In *Hatheway v. Secretary of Army*, 641 F.2d 1376 (9th Cir. 1981), we considered a challenge brought by an army officer convicted of sodomy by a general court-martial. We rejected Lieutenant Hatheway's claim that the practice of prosecuting homosexuals but not heterosexuals under a general sodomy statute was unconstitutional. We stated: "We understand Hatheway's claim (that the commission of a homosexual act is a impermissible basis for prosecution) to be an equal protection argument." *Id.* at 1382. We then applied intermediate level scrutiny and concluded that the

government could single out those who engage in "homosexual acts." *Id.* Our determination that strict scrutiny did not apply to Lt. Hatheway's claim, *id*, must necessarily be interpreted as meaning that we concluded that homosexuals are not a suspect class.

The majority argues that because our analysis in *Hatheway* was apparently based on the "fundamental rights branch" of equal protection analysis rather than on the "suspect class branch," *Hatheway* does not preclude the holding that homosexuals are a suspect class. Maj. op. at 1342-43. I disagree. The majority's position is based on too narrow a view of how courts decide constitutional questions and too narow a view of the extent to which we are bound by constitutional holdings. Had we thought in *Hatheway* that strict scrutiny was required by a "different branch" of the equal protection clause, it would have been our obligation to apply the higher test. The equal protection issue was squarely presented by Lt. Hatheway. We could have ruled against him, as we did, and failed to apply a standard under which he might have prevailed unless we believed the higher standard was inapplicable. Nowhere does the opinion state that Lt. Hatheway relied on one particular branch of the doctrine to the exclusion of the other, and we may not fairly make that assumptin. Nor are we free to refuse to apply our own precedent simply because the reasoning may be unpersuasive or the explanation less than complete. The holding in *Hatheway* is clear: intermediate level scrutiny, rather than strict scrutiny, applies to an equal protection claim based on discrimination against homosexuals. Because in *Hatheway* we recognized the equal protection claim, acknowledged the "three-tier approach," applied the intermediate level of

scrutiny, and ruled against the plaintiff, I do not believe we can blithely ignore its holding.[15]

IV.

Because we are not free to hold that homosexuals are a suspect class, we can not apply strict scrutiny to the Army's regulations. At the most the regulations must pass intermediate scrutiny – and in *Hatheway* we decided that the military's singling out of homosexual conduct for special adverse treatment survives that level of review: applying intermediate level scrutiny we concluded that prosecutions by the military on the basis of sexual preference bear "a substantial relationship to an important government interest." *Id.* at 1382. We then upheld the Army's discriminatory treatment of Hatheway. We are bound by *Hathway* to conclude that military "[c]lassifications which are based solely on sexual preference" survive an intermediate level of review.[16] *Id.*

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[15] Moreover, the majority's assumption that *Hatheway* relied solely on the "fundamental rights branch" may be based on an overly-simplified view of equal protection doctrine. While many equal protection cases clearly fall exclusively within one branch of the other, some, like *Hatheway*, do not. The facts in *Hatheway* involved both an activity to which special protection may be applicable – private sexual activity – and a group for which special protection may be required – homosexuals. In addition, the group is defined by its connection to the activity. Thus, *Hatheway* present the paradigmatic circumstances that call for a mixture or merger of the two branches. It appears that we may, intentionally or inadvertently, have used that approach in that case. *See Hatheway*, 641 F.2d at 1382.

[16] The only real question regarding *Hatheway* is whether our holding that mid-level scrutiny is applicable survives *Hardwick*. *Hatheway* established a ceiling for the appropriate level of scrutiny; *Hardwick* makes it clear, at a minimum, that the ceiling can be no higher.

Courts must give special deference when adjudicating matters involving the military. *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). In the context of a first amendment challenge, the Supreme Court has recently stated: "Our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger*, 106 S.Ct. at 1313. In *Beller v. Middendorf*, Judge, now Justice, Kennedy writing for our court said: "constitutional rights must be viewed in light of the special circumstances of the armed forces." 632 F.2d at 810-11.

In rejecting the Army's justifications for the regulation, the majority fails to give proper deference to the Army's determinations. Its failure to do so may result in part from its unwillingness to recognize the moral judgments regarding homosexuality approved in *Hardwick,* 106 S.Ct. at 2846, and deemed permissible, at least for the purpose of military regulations, by Judge Kennedy in *Beller,* 632 F.2d at 811-12. Although I see no merit in the Army's ideas about homosexuals, its beliefs about the consequences of allowing homosexuals to serve in the Army, and its pandering to negative stereotypes of homosexuals, *see* maj. op. at 1349-51, we are not permitted to substitute our views for the Army's "considered professional judgment" as to what kind of persons should be barred from enlisting in order to ensure a disciplined fighting force.[17] *Goldman v. Weinberger,* 106 S.Ct. at 1313.

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[17] To the claim in *Goldman v. Weinberger* that the military's regulation as applied was irrational and without empirical support, the Court stated:

> But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The

After analyzing the various explanation offered by the Army, the majority dismisses the purposes of the regulations as illegitimate or irrational. Maj. op. at 1349-52. Again, the majority takes a position that is not open to us. For not only have our cases told us we must defer to the military judgment in matters of this kind, they have upheld the very reasoning the majority now rejects. The justifications advanced by the Army involving negative views about homosexuals and homosexuality have been accepted by earlier decisions of this court as both legitimate and important. *Beller,* 632 F.2d at 811-12; *see Hatheway,* 641 F.2d at 1381-82. We are not free to reconsider those prior conclusions unless or until our court as a whole agrees to do so en banc.

It is true that, as the majority says on several occasions, maj. op. at 1340, 1350-51, the Army could not treat blacks as it treats homosexuals and could not base its regulations on negative judgments regarding blacks. No matter how appealing the analogy may be, we are not free to draw it here. *Beller* and *Hatheway* both approve discriminatory treatment against homosexuals, by the military, based on moral judgments regarding homosexuality. *See Beller,* 632 F.2d at 811-12; *Hatheway,* 641 F.2d at 1381-82; *see also Hardwick,* 106 S.Ct. at 2846. As the majority points out, similar biases against blacks could not form the basis for state action against that group. *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Thus, cases regarding blacks are simply irrelevant.[18]

> desirability of dress regulations in the military is decided by the appropriate military officers, and they are under no constitutional mandate to abandon their considered professional judgment.

106 S.Ct. at 1314.

[18] I am not suggesting, by any means, that all discriminatory statutes affecting homosexuals are valid. We are here dealing only

V.

The majority attempts to overcome the problems posed by *Hardwick* (and, to some extent, by *Hatheway*) by distinguishing between the class of persons who engage in homosexual acts and the slightly broader class of persons who have a homosexual orientiation. Relying on this distinction, the majority also argues that the Army regulation is about status, not conduct. It is unclear whether the majority is arguing that homosexuals are a suspect class simply because they are a class defined by status rather than conduct, or whether it is arguing that the equal protection question is unaffected by *Hardwick* because that case involves conduct rather than orientation. In either event, I do not believe we can escape the conclusion the "homosexuals", however defined, cannot qualify as a suspect class.

Even if we define the class as those who have a "homosexual orientation", its members will consist principally of active, practicing homosexuals.[19] That the class

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with *military* regulations. Other governmental action, including state statutes, would still be subject to examination under a number of constitutional principles, including the equal protection clause. As far as that clause is concerned, for purposes of this case it is necessary for me to conclude only that strict scrutiny is not the proper standard. *See* note 16, *supra*.

[19] The majority appears to be unwilling to acknowledge this point. See maj. op. at 1339 n. 14. However, the fact that homosexuals (or persons of "homosexual orientation") engage in or seek to engage in homosexual conduct is as unremarkable as the fact that "heterosexuals" (or persons of "heterosexual orientation") engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd. What distinguishes the class of homosexuals from the class of heterosexuals is not some vague "range of emotions", but the nature of the member's sexual proclivities or interests.

may also include a small number of persons who are or wish to be celibate is irrelevant for purposes of determining whether the group as a whole constituties a suspect class. I simply see no way to say that homosexuals defined broadly (by status) are a suspect class, but that the same group, if more narrowly defened (by conduct) is not. Whether the group is defined by status or by conduct, its composition is essentially the same. In short, "homosexuals" are either a suspect class or they aren't. The answer cannot depend on the niceties of class definition.[20]

What the majority may be arguing is that a regulation targeted at "orientation" is too broad to survive rationality review. However, if the majority is making this argument, there are a number of difficult questions it must answer first. For example, under the majority's status/conduct distinction, Watkins could be excluded from the Army based on regulations slightly more narrowly drawn so as to target only the class of persons who have engaged in homosexual conduct. If Watkins' action fall within that narrower categtory (and they do), and Watkins is therefore a member of a class of person that is not constitutionally protected, does he have standing to challenge the constitutionality protected, does he have standing to challenge the constitutionality of these regulations?[21] If he

[20] Nowhere in equal protection jurisprudence can there be found a protected class that is merely a slightly broader form of an unprotected class. In the end, the majority's distinction between status and conduct comes to nought. For if homosexuals were truly a suspect class, an Army regulation based on conduct would be as unconstitutional as one based on status. *See* maj. op. at 1340 ("We cannot read *Hardwick* as standing for the proposition that government may outlaw sodomy only when committed by a disfavored class of persons.").

[21] *See, e.g., Hatheway*, 641 F.2d at 1382-83 (person accused of homosexual sodomy lacks standing to challenge the constitutionally of applying a sodomy law to heterosexuals).

does, would the correct remedy be simply to strike the few words that make the regulations too broad, rather than invalidating all of the regulations?[22] *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). The majority simply does not discuss these and other similarly troublesome questions.

Moreover, I disagree with the majority's status/conduct distinction, as applied to this case, for another reason. I view the case before us as a conduct case. In my opinion, the facts regarding Watkins clearly demonstrate disqualifying acts and the regulations before us may properly be viewed as conduct regulations. First, Watkins has admitted to engaging in homosexual conduct with other servicemen while in the Army. Those admissions form an integral part of the reasons for the Army's refusal to permit him to reenlist. Second, the regulations must be construed in light of the Army's stated policy regarding homosexuality:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who by their statements demonstrate a propensity to engage in homosexual conduct seriously impairs the accomplishment of the military mission.

Army Regulation 635-200 § 15-2.[23] Read in this light, the regulations constitute an attempt to exclude those who

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[22] For example, the underlined words could be removed from the regulation's definition of "homosexual": "Homosexual means a person, regardless of sex, who engages in, *desires to engage in*, or intends to engage in homosexual acts." Army Regulation 635-200 ¶ 15-2(a)(emphasis added).

[23] The statement of policy is from the section "Separation for Homosexuality". However, there is no reason to believe that it would not be equally applicable to the section which states that homosexuality is a nonwaivable disqualification for reenlistment. Both sections use the same defintion of "homosexual".

engage in or will engage in homosexual acts. The majority makes much of the fact that the regulation allows a soldier an opportunity to prove that a homosexual act he has engaged in was aberrational. Maj. op. at 1338. Contrary to the majority, I do not think that this proves that the regulation is about orientation rather than conduct. The regulation's exception relates to conduct: it allows the Army to distinguish between soldiers who are likely to engage in homosexual conduct in the future (practicing homosexuals) and those who are not likely to do so (heterosexuals who engage in an isolated homosexual act due to intoxication or some similar reason). I consider the inclusion of this exception in the regulation to constitute a rational exercise of discretion—a legitimate attempt to predict future conduct on the basis of past conduct. However, I see little purpose in analyzing the Army's regulations in detail here. Suffice it to say that I disagree with the maority's characterization of them. In my opinion, the regulations are targeted at conduct—past, present, and future, but conduct nonetheless.

In the end the majority's status/conduct distinction does not advance its cause.[24] With or without that part of its analysis, the majority's effort ultimately comes a cropper on *Hardwick, Hatheway, Beller, Goldman* and *Rostker.*[25]

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[24] I do not reach the question whether that distinction is relevant for purposes other than criminal law. *Cf. Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (criminal penalties must be based on some act; they may not be inflicted merely on the basis of a person's condition).

[25] As the majority acknowledges, its conclusions are also contrary to those of several other circuits. In particular, see *Padula* v. *Webster,* 822 F.2d 97 (D.C. Cir. 1987), and maj. op. at 37-39.

CONCLUSION

As the majority points out, Sgt. Watkins has every reason to feel aggrieved. His homosexuality has been well known for many years. During that entire period, his army service has been exemplary. Those who have worked with him, including his supervisors, are anxious to see him continue with his military career. Yet, under the Supreme Court's (and our own circuit's) interpretation of the Constitution, the Army is free to terminate that career solely because he is a homosexual. There are only three entities which have the authority to afford Sgt. Watkins the relief which I, like the majority, believe a proper interpretation of the Constitution would require. First, the Supreme Court could undo the damage to the Constitution wrought by *Hardwick*; it could overrule that precedent directly or implicitly. Second, the Army could voluntarily abandon its unfair and discriminatory regulation (or, I would assume, the Department of Defense could direct it to do so). Third, the Congress could enact appropriate legislation prohibiting the armed services from excluding homosexuals. I recognize that from a practical standpoint the existence of these forums may offer Sgt. Watkins little solace. Nevertheless, I do not believe that a panel of the Ninth Circuit may, consistent with its duty to apply precedent properly, afford him the relief he seeks.

For the above reasons, I must reluctantly dissent.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-4006

SERGEANT PERRY J. WATKINS, PLAINTIFF-APPELLANT

v.

UNITED STATES ARMY, ET AL., DEFENDANT-APPELLEES

June 8, 1988

Prior Report: 847 F.2d 1329 (9th Cir. 1988).

ORDER

Before BROWNING, Chief Judge, GOODWIN, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALCARCON, POOLE, NELSON, CANBY, NORRIS REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, and TROTT, Circuit Judges.

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-3681

SERGEANT PERRY WATKINS, PLAINTIFF-APPELLEE

v.

UNITED STATES ARMY, ET AL., DEFENDANTS-APPELLANTS

Argued and Submitted Sept. 12, 1983
Decided Dec. 9, 1983

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Before: CHOY and NORRIS, Circuit Judges, and CURTIS,* District Judge.

CHOY, Circuit Judge:

In this action for declaratory and injunctive relief, a serviceman with an exemplary performance record was not allowed to reenlist solely because he is an admitted homosexual. It is clear that the Army knew of Watkins'

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* The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

sexual preference very early in his fourteen years with the service. However, in 1981 the Army promulgated new regulations requiring the discharge of any homosexual soldier notwithstanding the soldier's performance record or character of service. The district court held that the Army was estopped from using those regulations as a bar to Watkins' reenlistment, and enjoined the Army from refusing to reenlist Watkins on that ground. The Army has appealed under 28 U.S.C. § 1292(a)(1).

It is not our function to question the wisdom of those who changed Army regulations from those merely authorizing separation for homosexuality to regulations that mandate discharge. Absent a determination that the regulations cannot be given legal effect, however, the district court has no power to force Watkins' superiors to disobey them. We therefore reverse and remand.

I. STATEMENT OF FACTS

As the facts of this case are more fully set forth in the reported opinion of the district court, 551 F.Supp. 212 (W.D.Wash.1982), and in the district court's opinion in a previous stage of this case, 541 F.Supp. 249 (W.D.Wash.1982), they will only be summarized here.

Since Watkins' induction in August 1967, he has admitted to the Army that he is a homosexual. When he underwent his preinduction physical examination in 1967, he checked a box on his medical history report indicating that he then had homosexual tendencies or had previously experienced such tendencies. A staff psychiatrist evaluated him and found him qualified for admission. In November 1968, the Criminal Investigation Division (CID) investigated Watkins for committing sodomy, but dropped the charges for lack of sufficient evidence. Watkins received an honorable discharge on May 8, 1970 at the conclusion of his tour of duty.

One year later, Watkins reenlisted. He was denied a security clearance in 1972 because of his homosexuality, and he was investigated again by CID. Later that year, he performed a female impersonation act before the troops with the express permission of his unit commander.

In 1974, Watkins reenlisted for six years. In October 1975 his commander convened a board of consideration against him to determine if he was unsuitable for duty due to homosexuality. The board concluded that Watkins was homosexual but recommended his retention because of his excellent service record. In 1977, Watkins was granted a security clearance by his commander and applied for a position in a program that required applicants to have security clearance and to pass a background check. Watkins was initially declared ineligible because of his homosexual tendencies, but was subsequently accepted into the program at the insistence of his commanding officer.

Watkins reenlisted for a three year term in 1979. After an investigation by military intelligence, the Army's Personnel Clearance Facility revoked Watkins' clearance because he had stated in 1979 that he had been a homosexual for the past 15 to 20 years. The Army then initiated proceedings to discharge Watkins on the ground of homosexuality. Watkins filed suit in 1981 seeking an injunction against his discharge and reinstatement of his security clearance. After litigation involving his discharge, Watkins' tour of duty expired. Watkins then successfully applied to the district court for an injunction forbidding the Army to deny his reenlistment on the ground of homosexuality. The Army reenlisted Watkins for a six year term on November 1, 1982, with the proviso that the reenlistment would be voided if the district court's injunction were not upheld.

II. HISTORY OF THE ARMY'S REGULATIONS ON HOMOSEXUALITY

Under 10 U.S.C. § 1169, no enlisted person may be discharged prior to the expiration of his or her term except pursuant to law or the sentence of a court-martial, or as prescribed by the Secretary of the Army. Pursuant to that authority, the Army has promulgated regulations regarding separation of enlisted personnel. Army Reg. 635-200.

Prior to 1981, it was clear that homosexuality was regarded as a possible disqualification for military service. For example, under 1977 regulations homosexuality was regarded as "misconduct," Army Reg. 635-200, ¶ 14-33(a)(3) (Nov. 21, 1977), but the board convened to determine whether the enlisted individual should be discharged had the discretion to recommend retention. *Id.* ¶ 1-24(a)(3); *see also Id.* ¶ 13-23(b)(2) (July 15, 1966).

On March 10, 1981, however, the Headquarters, Department of the Army (HQDA) issued a document known as Interim Change No. IO5. That document promulgated a new Chapter 15 to Army Reg. 635-200 which exclusively addressed separation for homosexuality. In addition, it rescinded the provisions on homosexuality in Chapters 13 and 14 (separations for unsuitability or misconduct) and inserted a provision saying that retention of an enlisted homosexual would be decided using standards in the new Chapter 15, which, as it turned out, were not discretionary.

The language of Chapter 15 is stark. Retention of an admitted homosexual is not permitted absent an express finding that the soldier in question is in fact not homosexual. Army Reg. 635-200, ¶ 15-3(b) (Oct. 1, 1982). Moreover, retention of a soldier who attempted, solicited, of committed a homosexual act is not allowed unless there are specific findings to the effect that the act was an isolated incident which is unlikely to recur, that the enlisted

person does not desire or intend to engage in homosexual acts, *and* that the soldier's continued presence in the Army is consistent with the interest of the military. *Id.* ¶ 15-3(a).

Despite its directed language, the new Chapter 15 generated some confusion. Boards of officers were recommending the retention of enlisted personnel who, but for their homosexuality, were exemplary soldiers. HQDA, concluding that this practice was at variance with the new policy, issued a release saying that the intent of the new policy was to permit retention only of nonhomosexual soldiers. *See* Message No. 161400Z, ¶¶ 4-5 (HQDA June 1982). HQDA thus made clear that Army's new policy immediately disqualifies any homosexual from continued military service irrespective of the character of the soldier's past service.

III. DISCUSSION

The Army urges that the decision of the Army not to retain Watkins is unreviewable in a civilian court. Watkins counters by saying that this court has established standards relating to judicial review of military personnel action in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.1981), *rev'd.* ____ U.S. ____, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and that those standards were met here.

At the outset, we note that the courts of appeals have long held that review is available where military officials have violated their own regulations. *Denton v. Secretary of the Air Force*, 483 F.2d 21, 24-25 (9th Cir.1973), *cert. denied,* 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974); see also authorities cited in *Mindes v. Seaman*, 453 F.2d 197, 200 (5th Cir.1971). In this case, however, the district court in effect ordered military officials to violate their own regulations through the use of, as the district court termed it, "the equity powers of this court." 551 F.Supp. at 218.

The Supreme Court has recognized that the broad powers that courts possess to regulate civilian life are to a large extent inapplicable to the military. Simply put, military and civilian life are regulated by two separate systems of justice, to some extent parallel but nevertheless distinct. *Chappell v. Wallace*, ____ U.S. ____, 103 S.Ct. 2362, 2367, 76 L.Ed.2d 586 (1983); *Orloff v. Willoughby*, 345 U.S. 83, 94, 73 S.Ct. 534, 549, 97 L.Ed. 842 (1953). Encroachment of civilian court power into military life must necessarily be limited, for "judges are not given the task of running the Army," *Orloff*, 345 U.S. at 93, 73 S.Ct. at 549, *quoted in Chappell*, 103 S.Ct. at 2366, and "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 187 (1962).

In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971), the court held that it would not review internal military affairs absent "an allegation of the deprivation of a constitutional right or an allegation that the military has acted in violation of applicable statutes or its own regulations." *Id.* at 201. We adopted the *Mindes* test, at least in part, in *Wallace v. Chappell*, 661 F.2d 729, 733 (9th Cir.1981), *rev.'d on other grounds*, ____ U.S. ____, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), recognizing that litigation is potentially disruptive to military operations and creates difficulty in maintaining discipline. *Id.* at 732; *accord Henninger v. United States*, 473 F.2d 814, 815-16 (9th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). It is clear that a court using its equitable powers to compel superior officers to disobey regulations at the instance of a subordinate is a serious threat to military discipline.

A court, however, is justified in using its power to compel military personnel to disobey regulations which the court has determined are repugnant to the Constitution or

to statutory authority. *See Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *cf. Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) (per curiam) (holding that a court may review a decision of the Secretary of the Army to determine whether he acted in excess of his statutory authority). That is not the case here. Although Watkins' complaint included claims that the Army regulations in question are repugnant to the Constitution, the district court declined to rule on any constitutional question. Moreover, we note that this court has upheld similar regulations in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981).

We realize that the court in *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir.1981), affirming a summary judgment in favor of the Government, did reach the merits of an estoppel claim brought by a serviceman without discussing the issue of reviewability. The *Lavin* court, however, was not obliged to decide the reviewability issue. Since the court resolved the estoppel issue in the Government's favor, the outcome of the case would have been the same even if the court had held the claim nonreviewable. *Lavin* is therefore not inconsistent with our determination here.

We hold, therefore, that the broad equitable powers the courts possess to regulate civilian life may not be used to force the military to disobey its own regulations absent a determination that the regulations cannot be given legal effect. Accordingly, the judgment of the district court must be reversed. There is no need to reach the Army's other contentions on appeal.

REVERSED and REMANDED.

NORRIS, Circuit Judge, concurring:

When Staff Sergeant Perry Watkins enlisted in the Army in 1967, he openly declared that he was homosexual. He then invested fourteen years of his life pursuing a career in the military, while never hiding his sexual preference. His performance as a soldier was exemplary, as Judge Choy states. Indeed, one officer called Sgt. Watkins the best clerk he had ever known. To their credit, his superior officers judged his performance on merit and promoted him rapidly, disregarding his homosexuality as irrelevant to their evaluations.

The Army rewarded Sgt. Watkins' years of outstanding service by destroying his chosen career. When he needed only five more years to qualify for retirement benefits, he was discharged solely because the Army decided to purge all homosexuals from its ranks by changing its regulations to make discharge of homosexuals mandatory rather than discretionary. In my view, this regressive policy demonstrates a callous disregard for the progress American law and society have made toward acknowledging that an individual's choice of life style is not the concern of government, but a fundamental aspect of personal liberty. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (striking state statute banning use of contraceptives because it infringed on fundamental right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (striking statute prohibiting sale of contraceptives to unmarried person because fundamental right of privacy not limited to what transpires in the marital relationship). After the change in regulations, Sgt. Watkins' superior officers could not save his military career, despite his exemplary record. As a consequence, our nation has lost a fine soldier, and Sgt. Watkins has suffered a manifest injustice.

Today, however, I have no choice but to concur in the majority's disposition of Sgt. Watkins' appeal. We are bound as a regular three-judge panel to follow *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980), in which this court upheld the constitutionality of similar regulations adopted by the Navy. In so holding, our court abdicated one of its primary duties: to safeguard individual rights against intrusions engendered by governmental insensitivity or bigotry. To me, the Army's current bias against homosexuals is no less repugnant to fundamental constitutional principles than was its long-standing prejudice against minority servicemen.

In dissenting from the refusal of the court to rehear *Beller* en banc, I discussed my reasons for believing that these pernicious military regulations cannot withstand judicial scrutiny and that the importance of the issue justifies en banc review. *Miller v. Runsfeld*, 647 F.2d 80 (9th Cir.1981) (Norris, J., dissenting from order denying suggestion of rehearing en banc). Those views remains unchanged.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C81-1065R

SERGEANT PERRY WATKINS, PLAINTIFF

v.

UNITED STATES ARMY, ET AL., DEFENDANTS

[Filed Nov. 21, 1984]

ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on plaintiff's renewed motion for summary judgment on constitutional and statutory grounds. Having carefully reviewed all pleadings, submitted in support of and in opposition to plaintiff's motion, and being familiar with the entire record in the case, the court rules as follows:

The facts in this case, which are undisputed, were set forth at length in this court's prior memorandum and order. *Watkins v. United States Army*, 551 F. Supp. 212 (W.D. Wash. 1982). In that opinion, the court ruled that the Army was equitably estopped from denying reenlistment to plaintiff, an admitted homosexual, pursuant to Army regultions which make homosexuality a nonwaivable disqualification from reenlistment. The Ninth Circuit reversed, holding that this court's equitable powers "may not be used to force

the military to disobey its own regulations absent a determination that the regulations cannot be given legal effect," and remanding the case. *Watkins v. United States Army*, 721 F.2d 687, 691 (9th Cir. 1983).[1] In keeping with the Ninth Circuit's directive, plaintiff's motion now addresses the question left undecided by this court's prior decision: whether, at least as applied in his case, the Army's regulations disqualifying homosexuals from reenlistment are repugnant to the United States Constitution or to statutory authority.

Plaintiff argues that denial or reenlistment pursuant to Army regulations making homosexuality a nonwaivable disqualification violates his fundamental constitutional right to privacy and his right to substantial due process. But, as plaintiff acknowledges, the Ninth Circuit has already considered and rejected these arguments in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), a case testing the validity of similar regulations promulgated by the United States Navy. This court is bound by the *Beller* decision.

Plaintiff also challenges the Army's denial of his reenlistment on First Amendment grounds, arguing that he cannot be penalized constitutionally for making statements acknowledging his homosexuality. Plaintiff relies on *ben-Shalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980), in which the court struck down Army regulations permitting the discharge of any soldier who "evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts," and *Matthews v. Marsh*, No. 82-02106P (D. Me. April 3, 1984), in which the court held that the Army violated plaintiff's First Amendment rights by disenrolling her from the Reserve Officer's Training

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[1] Plaintiff filed a petition for rehearing and suggestion of appropriateness of rehearing en banc which was denied on May 3, 1984. The Ninth Circuit issued its mandate on May 11, 1984.

Corps as a result of her declaration of homosexuality without any evidence of homosexual conduct.

Based on the facts in this case, the court finds *benShalom, supra*, and *Matthews, supra,* readily distinguishable. Plaintiff not only spoke about his homoexuality, but also admitted having engaged in homosexual acts. *See Watkins, supra*, 551 F. Supp. at 215. The First Amendment does not protect conduct.

Finally, plaintiff's three other arguments all suffer from the same defect: they are foreclosed by the Ninth Circuit's decisions in *Beller, supra*, and *Watkins, supra*, 721 F.2d 687. Plaintiff asserts that the Army's decision to deny him reenlistment is arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 702. But in upholding the general constitutionality of regulations similar to those dictating the Army's decision to deny plaintiff reenlistment, the *Beller* court recognized the possibility of harsh, unwise, even arbitrary results in an individual situation and ruled that review of individual decisions was not necessary. *Beller*, 632 F.2d at 807-812. Therefore, no matter how irrational the Army's denial of reenlistment may be in the particular circumstances of plaintiff's case, "we cannot under the guise of due process give our opinion on the fairness of [this] application of the military regulation." *Id.* at 812.

Plaintiff argues that the Army's actual reason for denying him reenlistment is retaliatory in nature. He asserts that the Army is seeking to punish him for appealing from the revocation of his security clearance on the grounds of homosexuality, and that this conduct violates his First Amendment right to petition and his Fifth Amendment right to due process. Whatever the merits of this argument, it constitutes a collateral attack on the Army's actions which cannot afford plaintiff any relief. The only relevant question is whether the regulations at issue can be given legal

effect. If so, this court cannot order the military to disobey those regulations. *Watkins*, 721 F.2d at 690-691.

The same deficiency inheres in plaintiff's argument that, on due process grounds parallel to the principles underlying equitable estoppel, the military should be barred under enforcing its regulations against him. Absent a finding of legal defect in the regulations themselves, the fact that their enforcement may be unfair in plaintiff's individual case cannot bar the military.

The court also notes that the facts in the cases relied on by plaintiff to support his due process argument do not directly parallel his situation. *See Raley v. Ohio*, 360 U.S. 423 (1959); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Moser v. United States*, 341 U.S. 41 (1951). In those cases, the government was deemed to have entrapped the plaintiffs into the very behavior for which it later sought to punish them. In the instant case, the Army did not entrap the plaintiff into being homosexual; at most, it induced him to believe that his homosexuality would not bar him from a career in the military.

Therefore, the court finds none of plaintiff's arguments meritorious. It does so, nevertheless, with the abiding conviction that plaintiff has suffered a grievous wrong for which there is simply no remedy at this juncture. The holding in *Beller* is stated in such broad terms that it encompasses plaintiff's situation, and compels this result. But as *Beller* itself acknowledges, "[upholding] the challenged regulations as constitutional is distinct from a statement that they are wise." 632 F.2d at 812.

Furthermore, if one case could establish not only the lack of wisdom, but also the irrationality of the Army's policy categorically barring homosexuals from its ranks, this would be it. From the time of his induction into the Army in 1967, plaintiff has been utterly candid about his homosexuality, and for all those years, he has been deemed an outstanding

soldier. In an evaluation he received in 1983, two years after he filed this suit, he received the highest ratings possible for his job performance. The comments of his evaluators included the following: "without exception, one of the finest Personnel Action Center Supervisors I have encountered," "totally reliable and a wealth of knowledge," "always exceeds the requirements and demands placed on him," "an asset to any unit to which he is assigned," "[his] positive influence has been felt throughout the Battalion and will be sorely missed." Yet the Army denied him reenlistment pursuant to a policy which declares, without possibility for discretion or exception, that homosexuals are per se threats to military effectiveness and efficiency.

Plaintiff's renewed motion for summary judgment is DENIED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 21st day of November, 1984.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C81-1065R

SERGEANT PERRY WATKINS, PLAINTIFF

v.

UNITED STATES ARMY, ET AL., DEFENDANTS

[Filed Oct. 5, 1982]

ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the court on the parties' cross-motions for summary judgment. At issue is whether the United States Army may deny reenlistment to plaintiff based on plaintiff's admitted homosexuality. On May 18, 1982 the court ruled that the Army could not, under its own regulations, validly discharge plaintiff on grounds of homosexuality. The undisputed facts that provided the foundation for that ruling are also controlling here:

On August 27, 1967 plaintiff reported to an Army facility for his preinduction physical examination. On a Report of Medical History plaintiff checked the box "YES" indicating that he then had homosexual tendencies or had experienced homosexual tendencies in the past. Transcript of Proceedings Before Administrative Discharge Board, October 28 & 29, 1981 (Tr. at Inclosure 7.) A psychiatrist eval-

uated plaintiff and found him "qualified for admission." *Id.* Following induction and training, plaintiff served in the United States and Korea as a chaplain's assistant, personnel specialists, and company clerk. Defendants' Memorandum in Support of Motion for Summary Judgment on Discharge Issue, at 3. While at Fort Belvoir, Virginia in November 1968, plaintiff stated to an Army Criminal Investigation Division agent that he had been homosexual since the age of 13 and had engaged in homosexual relations with two servicemen. Tr. at Inclosure 9. The investigation of plaintiff for committing sodomy, a criminal offense under Article 125 of the Uniform Code of Military Justice, was dropped because of insufficient evidence. Tr. at Inclosure 10, at 2. Plaintiff received an honorable discharge from the Army on May 8, 1970 at the conclusion of his tour of duty. Official Military Personnel File at 47. His reenlistment eligibility code was listed as "unknown." *Id.*

In May 1971 plaintiff requested correction of the reenlistment designation in his release papers, and on June 3 the Army notified him that his reenlistment code had been corrected to category 1, "eligible for reentry for a period of three years. *Id.* at 56. During the fall of 1971, with the permission of the acting commanding officer of his unit, plaintiff performed an entertainment act as a female impersonator before the troops at a celebration of Organization Day for the 56th Brigade. Amended Complaint ¶ 19. Plaintiff's performance was reported in the December 1, 1971 issue of *Army Times*, a publication distributed to Army personnel worldwide. *Id.* ¶ 20. In the spring of 1972, plaintiff performed as a female impersonator at the Volks Festival in Berlin, West Germany, with the express permission of his commanding officer. *Id.* ¶ 22. In January 1972 plaintiff was denied a security clearance based on his November 1968 statements concerning his homosexuality. Military Intelligence File at 22.

Following an honorable discharge on March 21, 1974, plaintiff reenlisted for six years and was subsequently reassigned to South Korea as a company clerk. Official Military Personnel File at 65. In October 1975 plaintiff's commander initiated elimination proceedings against plaintiff for unsuitability due to homosexuality pursuant to AR 635-200, Chapter 13. On October 14, 1975 a four member board convened a Camp Mercer, South Korea and heard testimony indicating that plaintiff was homosexual. Military Intelligence File at 84. Captain Albert J. Bast III testified that as plaintiff's commander he had discovered, through a background records check, that plaintiff had a history of homosexual tendencies. When Bast asked plaintiff about it, plaintiff stated that he was homosexual. *Id.* at 85. Bast testified further that plaintiff was "the best clerk I have known," and that plaintiff's homosexuality did not affect the company. *Id.* First Sergeant Owen Johnson testified that everyone in the company knew that plaintiff was homosexual and that plaintiff's homosexuality had not caused any problems or elicited any complaints. *Id.* at 86. The board made the following unanimous finding: "SP5 Perry J. Watkins is suitable for retention in the military service." *Id.* at 87. The board's recommendation was that plaintiff "be retained in the military service," and that plaintiff was "suited for duty in administrative positions and progression through Specialist rating." *Id.* The board's recommendation became the final decision of the Secretary. Defendant's Memorandum on Discharge Issue, at 6.

Following an assignment in the United States as a unit clerk, plaintiff was reassigned to Germany, where he served as a clerk and a personnel specialist with the 5th United States Army Artillery Group. In November 1977 the commander of the 5th USAAG granted plaintiff a security clearance for information classified as "Secret." *Id.* at 14. Thereafter plaintiff applied for a position in the Nuclear

Surety Personnel Reliability Program, which required an applicant to have a security clearance for information classified as "Secret" and to pass a background investigation check. Amended Complaint ¶ 28. Plaintiff was initially informed that, becase his medical records showed he had homosexual tendencies, he was ineligible for a position in the program. Defendants' Memorandum at 5 n.1; Amended Complaint ¶ 29. Plaintiff appealed. *Id.* ¶ 30. In support of his appeal plaintiff's commanding officer, Captain Dale E. Pastian, requested that plaintiff be requalified because plaintiff had been medically cleared, because of plaintiff's "outstanding professional attitude, integrity, and suitability for assignment" in the program, and because the 1975 Chapter 13 board recommended that plaintiff be retained and be allowed to progress in the military. Military Intelligence File at 68. Examining physician Lieutenant Colonel J.C. De Tata. M.D., concluded that plaintiff's homosexuality appeared to cause no problems in his work and noted that plaintiff had been through a Chapter 13 board "with positive results." *Id.* at 70. The decision to deny plaintiff's eligibility for the Nuclear Surety Program was reversed and plaintiff was accepted into the program in July 1978. *Id.* at 64.

On October 26, 1979 plaintiff was permitted to reenlist for a three year term. By letter dated December 18, 1979 the commander of the U.S. Army Personnel Clearance Facility notified plaintiff of the Army's intent to revoke his security clearance. *Id.* at 12. The letter stated that revocation was being sought "because during an interview on 15 March 1979, you stated that you have been a homosexual for the past 15 to 20 years." *Id.* Plaintiff submitted a rebuttal letter on May 29, 1980 admitting making that statement. *Id.* at 8. The commanding officer of the Central Security Facility revoked plaintiff's security clearance by letter dated July 10, 1980. *Id.* at 6.

In February 1981 plaintiff appealed the revocation to the Office of the Assistant Chief of Staff for Intelligence. Amended Complaint, Exhibit J-2. The Assistant Chief of Staff's Office stayed action on plaintiff's appeal pending the determination whether separation proceedings under Chapter 15 would be commenced. Declaration of Ronald W. Morgan, filed April 12, 1982. Plaintiff brought this action on August 31, 1981 challenging the revocation of his security clearance because he had admitted to being homosexual and seeking to prevent his discharge from the Army for homosexuality.

Separation proceedings were commenced under Chapter 15. An administrative discharge board recommended, 2-1, that plaintiff be given an honorable discharge, and plaintiff's commanding officer approved that recommendation. The court ruled that the Army administrative double jeopardy provision precluded plaintiff's discharge on grounds that he had admitted to being homosexual. The court also ordered briefing on the reenlistment issue, which had been raised by the pleadings.

The Army maintains that plaintiff's reenlistment claims lacks merit because (1) the Army's decision to deny reenlistment is not subject to judicial review; (2) plaintiff's claim is one of promisory estoppel and therefore barred against the United States; (3) even if viewed as an equitable estoppel claim, plaintiff's claim must be barred because the United States acts in its sovereign capacity when it reenlists soldiers; and (4) the facts of this case do not support an equitable estoppel claim against the United States.

I. JUDICIAL REVIEW

The court does not agree that judicial review is inappropriate. Plaintiff alleges that denial of reenlistment based on his admitted homosexuality violates the Constitution,

and that military regulations should be not be applied so as to deny him reenlistment.

Plaintiff has exhausted effective intraservice remedies. On July 26, 1982 plaintiff submitted a timely application for reenlistment to his commanding officer, Captain Rodger L. Scott. Captain Scott requested an interview with plaintiff pursuant to Army procedures. Since plaintiff's counsel was unable to be present on the date set for the interview, counsel instructed plaintiff to refuse to answer questions concerning this lawsuit. *See* Affidavit of Jim Lobsenz (filed Sept. 14, 1982); Declaration of Captain Rodger L. Scott (filed Sept. 13, 1982); Declaration of Captain Russell D. Johnson (filed Sept. 24, 1982). Plaintiff's counsel did not indicate that plaintiff would refuse to answer questions at an interview at which counsel could be present. *See* Affs. of Jim Lobsenz (Sept. 14, 1982; Sept. 30, 1982). No such interview has yet occurred. Captain Scott denied plaintiff's reenlistment request on July 28, 1982 for the following reasons:

> Because of self admitted homosexuality as well as homosexual acts and his refusal to answer questions concerning his homosexuality or homosexual acts.

Attachment A to Lobsenz Aff. (filed Sept. 14, 1982). Captain Scott's finding that plaintiff has refused to answer questions is totally unsupported by the evidence and cannot stand. *See Sanford v. United States*, 399 F.2d 693, 694 (9th Cir. 1968) (per curiam); *Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir. 1974); 5 U.S.C. § 706(2)(A), (D). *See* Declarations of Captain Russell D. Johnson (filed Sept. 24, 1982); Affidavit of Jim Lobsenz (filed Sept. 30, 1982). Plaintiff's admitted homosexuality is the only ground for denial of reenlistment upon which the court will exercise review of this time.

Further applications for reenlistment within the Army would clearly be fruitless. The Army's position, asserted in pleadings submitted in this case, is that plaintiff is ineligible for reenlistment due to a nonwaivable disqualification. The Army does not maintain that plaintiff stands any chance of receiving a favorable disposition if he pursues intraservice remedies at his point: any office acting on a request by plaintiff for reenlistment would have a duty to deny it. This court will not require plaintiff to exhaust futile remedies.

The nature of plaintiff's claim has been described: it is an appeal to the equity powers of this court. And plaintiff's claim is strong from an equitable standpoint, as will be discussed in detail below. If review is refused the injury to plaintiff could be quite serious. Plaintiff has made the Army his career by investing fourteen years toward developing and refining skills necessary for military employment. The immediate harm to plaintiff if review is refused would be the loss of his job. Other effects would be the loss of a fourteen year investment toward retirement benefits, as well as the necessity for retraining in order to qualify for civilian employment. Judicial review obviously will not in itself prevent these events from occurring. It will, however, insure that they not occur impermissibly or unjustly. Moreover, while the court does not find it necessary to rule on plaintiff's constitutional arguments, those arguments cannot fairly be characterized as frivolous. Plaintiff certainly has an interest in having an Article III court independently review those claims.

There is necessarily some interference with military functions whenever a non-military tribunal reviews military action. What this court must be sensitive to a is a degree of interference unwarranted by the need for review. Manay cases will arise in which the balance is struck in favor of abstention, but this is not such a case. First, according to defendants, military discretion and expertise was not in-

volved in the denial of plaintiff's request for reenlistment. The decision was automatic. Second, the court's examination of the Army's reenlistment decision concerning a single service-member can cause very little disruption of the overall military function. Defendants' contention that the floodgates will be opened to exotic claims by other servicemembers is unpersuasive. The facts demonstrate the uniqueness of plaintiff's case.

The prerequisities for judicial review established by *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), have been satisfied here.

II. PROMISSORY ESTOPPEL

Defendants characterize plaintiff's claim as one for promissory estoppel, arguing strenuously that plaintiff is trying to use estoppel to create a right to reenlist, rather than as a shield against a defense raised by the Army. So characterized, they contend that plaintiff's claim does not lie against the United States. *See Jablon v. United States*, 657 F.2d 1064, 1069-70 (9th Cir. 1981). "[P]romissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have. . . ." *Id.* at 1068.

The court does not read plaintiff's request so broadly. Plaintiff's argument is not that he has a right to reenlist. His argument is that the Army cannot deny him reenlistment because of his homosexuality. He asserts that, but for the Army's reliance on the military regulation making homosexuality a "nonwaivable disqualification," he is eligible for reenlistment. Accordingly, plaintiff seeks to estop defendants from relying on the regulation as a *bar* to his eligibility for reenlistment. Promissory estoppel is not a part of this case.

Defendants note in passing that Army Regulation (AR) 601-280, ¶ 1-6*a* permits the Secretary to deny reenlistment to "anyone, including those who otherwise meet the criteria specified in this regulation." The Army clearly has not relied on this regulation in denying plaintiff reenlistment. It has relied on plaintiff's admitted homosexuality, as the record reflects. As denial of reenlistment at this point for "no reason" would therefore lack any foundation.

III. SOVEREIGNTY

Defendants argue next that equitable estoppel cannot be asserted against the United States when it acts in its sovereign capacity. In this court's opinion, the Ninth Circuit has not endorsed any such per se rule.

Defendants rely on *Saulque v. United States,* 663 F.2d 968 (9th Cir. 1981). In that case the Secretary of the Interior denied an Indian's application for an allotment of a parcel of land under the Indian Allotment Act, finding that the land would not support the applicant's family, as required by the Act. The Indian's suit against the Secretary was dismissed by the district court. The court of appeals affirmed, holding that the Secretary's determination was supported by substantial evidence and that estoppel would not lie against the government. In rejecting the estoppel claim, the court decided that (1) a 1913 letter from a "low-level officer of the Department" concerning the suitability of the land for allotment was not the act of the Secretary and therefore could not bind the government; (2) the Department's mistake in granting an allotment of similar land in the same area to another individual could not bind the government and require that it perpetuate its error; and (3) a statement in a letter to the plaintiff from the Department's Area Realty officer that the land was allocable could not bind the government because the office lacked authority,

because the plaintiff knew that the officer's statement was not binding on the Department, and because in denying plaintiff's application the government was acting in its sovereign capacity.

It is apparent from the opinion in *Saulque* that the issue whether the United States was acting in its sovereign capacity was unnecessary to the decision. The controlling facts were that the agents who had made representations to plaintiff lacked authority and that plaintiff did not in fact rely on their representations. Moreover, *Saulque* must be read in the light of prior case law in this circuit. In *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973), the court stated:

> This proposition [that equitable estoppel can be asserted against the government] is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity.

Id. at 989 (citing same case cited by court in *Saulque*) (footnote omitted).

Similar, in *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976), Judge Choy, concurring and dissenting, said:

> We have not rested our decisions on whether we categorized acts as proprietary or sovereign, however; we have simply recognized that protection of the public welfare and deference to congressional desires is much more apt to outweigh hardships to private individuals in the equitable balance when estoppel is asserted against sovereign acts.

Id. at 496 (citations omitted). And in *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), a panel composed of judges that had not joined

Judge Choy's concurring and dissenting opinion in *Santiago* stated simply: "[E]stoppel may be applied against the government even when acting in its sovereign capacity." *Id.* at 703 (citation omitted).

The court simply cannot believe that *Saulque* was intended to overrule—sub silentio—this recognized body of authority. Rather, the indication in *Saulque* that the government was acting in a sovereign capacity must be read as another factor that the court considered. That the military function is a sovereign function, therefore, does not in itself bar plaintiff's claim.

IV. EQUITABLE ESTOPPEL

The question here is whether the elements of equitable estoppel are present. Those are:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Lavin v. Marsh, 644 F.2d 1378, 1382 (9th Cir. 1981) (citation omitted). In addition, because the estoppel is asserted against the government, the plaintiff must show " 'affirmative misconduct' as opposed to mere failure to inform or assist." *Id.* (citation omitted).

1. *Did the Army Know the Facts?*

At his preinduction physical examination in August 1967 plaintiff checked the box on his medical history chart indicating that he had homosexual tendencies. The examining psychiatrist apparently did not believe plaintiff and designated plaintiff as qualified for admission. In November

1968 plaintiff admitted his homosexuality to an Army Criminal Investigation Division agent. Plaintiff was honorably discharged in May 1970 and his reenlistment code was listed as "unknown." Plaintiff requested correction of that code. The Army reclassified plaintiff as eligible for reentry on active duty, and in June 1971 plaintiff reenlisted for three years. In January 1972 plaintiff was denied a security clearance based on his 1968 admission of homosexuality. After another honorable discharge, in March 1974 plaintiff reenlisted for a six year term. In 1975 plaintiff's commander initiated discharged proceedings against plaintiff for unsuitability due to homosexuality. A four member board composed of a Major, two Captains and a First Lieutenant heard testimony establishing that plaintiff was homosexual. Plaintiff's commander, Captain Albert J. Bast III testified that plaintiff, who had told Bast he was homosexual, was "the best clerk I have known." First Sergeant Owen Johnson testified that everyone in the company knew plaintiff was homosexual and that plaintiff's homosexuality had not caused any problems. As noted earlier, the board recommended retention. In November 1977 plaintiff was granted a security clearance for information classified as "Secret." Plaintiff then applied for a position in the Nuclear Security Personnel Reliability Program. Plaintiff was initially rejected because his medical records reflected his homosexuality. Plaintiff appealed. His commanding officer, Captain Dale E. Pastian, wrote in support of plaintiff's appeal, requesting that plaintiff be requalified notwithstanding plaintiff's record. An examining physician concluded that plaintiff's homosexuality caused no problems in his work. The Army requalified plaintiff for admission into the Program in July 1978. In October 1979 plaintiff reenlisted for three years.

Defendants' position, asserted in their brief and at the hearing on these motions, that Army personnel respon-

sible for plaintiff's enlistment and reenlistments did not know that plaintiff was homosexual, is patently absurd. All of the events described above are documented in plaintiff's official Army files. For the Army to acknowledge that it is aware of plaintiff's homosexuality when it comes to conducting criminal investigations, holding discharge proceedings, and revoking security clearances, but maintain that it is ignorant when four enlistments are at issue, suggest bad faith. *See* Fed. R. Civ. P. 11. The Deputy Chief of Staff for Personnel, primarily responsible for Army reenlistment, *see* AR 601-280, ¶ 1-7.1*a*, cannot be deemed unaware of the contents of plaintiff's personnel file.

2. ***Did the Army Intend that Plaintiff Act in Reliance on its Conduct, or Did the Army so Act that Plaintiff Had a Right to Think the Army so Intended?***

a. What was the Army's conduct?

Plaintiff was admitted into the Army after stating under oath that he had homosexual tendencies. Plaintiff was honorably discharged in 1970. Plaintiff requested reclassification of his reenlistment code since it had been designated as "unknown" at the time of plaintiff's discharge, and the Army reclassified plaintiff as "eligible for reentry." This reclassification occurred when though plaintiff admitted to an Army Criminal Investigation Division agent in 1968 that he had been homosexual since age 13 and had engaged in relations with two servicemen. The Army reenlisted plaintiff for a three year period in 1971 and honorably discharged him in 1974. Plaintiff was then permitted to reenlist for a six year term. In 1975 a four member administrative board recommended that plaintiff be retained in the Army and be allowed to progress despite uncontradicted evidence that plaintiff was homosexual, and its recommendation became the final decision of the Army. In 1978 plaintiff was accepted into the Nuclear Surety Personnel Reliability

Program despite his admitted homosexuality. In 1979 plaintiff was reenlisted for another three year period. This is the conduct of the Army that is relevant to plaintiff's estoppel claim.

b. Did the Army's conduct amount to "affirmative misconduct"?

"Affirmative misconduct," an essential element of plaintiff's claim, must be determined on a case-by-case basis. *Lavin v. Marsh*, 657 F.2d at 1382-83 n.6. However, some general principles can be isolated. It is not necessary that government agents intends to mislead a party. *Jablon v. United States*, 644 F.2d at 1067 n.5. "Affirmative misconduct for equitable estoppel purposes can be present when the government acted (gave incorrect information, e.g.) rather than failed to act (failed to warn someone that his or her conduct is illegal)." *Id.* (citations omitted).

Affirmative misconduct breaks down into two components. There must be misfeasance, as opposed to nonfeasance, although these are "slippery terms." *Santiago v. INS*, 526 F.2d at 493. And the act done must be within the scope of the actor's authority. *Saulque v. United States*, 663 F.2d at 974 (citation omitted). It is well settled that the government is not bound by the *unauthorized* acts of its agents. *See Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380, 384 (1947).

Here it is plain that Army officers acted "affirmatively" in admitting, reclassifying, reenlisting, retaining and promoting plaintiff. This conduct cannot be characterized as a "mere failure to inform or assist." *Lavin v. Marsh*, 644 F.2d at 1382. The Army did not stand aside while plaintiff reenlisted or accepted a promotion. It gave plaintiff those privileges. The facts here are as extreme as those in *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975), where the court did not hesitate to estop the government from

disavowing its misconduct. Without Army approval plaintiff would not have been able to enter, remain or progress in the Army. The defendants point out that reenlistment is exclusively the Secretary's function. Here he exercised his authority three times.

It is also plain that the conduct under consideration, while contrary to regulations, was well within the scope of authority of the officers that performed it. Plaintiff's induction was handled by an induction officer, his reclassification and reenlistments by officials with reenlistment authority, the Chapter 13 proceeding by a duly constituted board of officers, and his admission into the Nuclear Surety Program by the Adjutant General. This is undisputed. To satisfy the element of affirmative misconduct the court need look no further.

c. Was the Army's conduct intended to induce reliance, or was it such that plaintiff had a right to think it was so intended?

Whether the affirmative acts under consideration were intended to be relied on by plaintiff as an indication that his homosexuality would not bar a military career is a question of fact. Plaintiff has not offered any evidence to prove that there were.[1] Plaintiff has instead urged the court to conclude, as a matter of law, that the affirmative acts were such that plaintiff had a right to think they were intended to be relied upon.

Taken individually, the acts of Army officers in enlisting plaintiff, reenlisting plaintiff, recommending plaintiff for retention in the military, and promoting plaintiff to a sensitive position in the Nuclear Surety Program cannot be

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[1] Defendants have offered only argument, not evidence, as proof that no Army officer with knowledge of plaintiff's homosexuality intended to induce plaintiff to believe he could enjoy a military career. *See* Defendants' Memorandum on Issue of Reenlistment, at 9-12.

viewed otherwise than as commitments by plaintiff and the Army for the periods covered. Had plaintiff failed to report for duty, or deserted his post, or disobeyed his commanding officer, the Army could have instituted proceedings against him. *See* Arts. 85, 90 & 92, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 890, 892. By the same token, the Army made a commitment to plaintiff to pay him and to permit him to serve during each of the enlistment and reenlistment periods. Had the Army failed to pay plaintiff or disallowed plaintiff from serving, plaintiff just as certainly could have sought enforcement of the Army's obligations. *See* 37 U.S.C. § 204; *Bell v. United States*, 366 U.S. 393, 401-04 (1961). The court does not hear the Army to argue that Sgt. Watkins was bound by his contracts with the Army but that the Army was not also bound.

The Army's position, rather, is that even though responsible Army officers decided to enlist, reenlist, retain and promote plaintiff, plaintiff had no right to expect that those privileges would continue to be extended. In essence, the Army contend that plaintiff assumed the risk that his Army career would be discontinued at any time based on his homosexuality. The court cannot agree.

Plaintiff declared his homosexuality to the Army from the very beginning, and even if he was not believed at first, doubt that he was in fact homosexual was resolved in 1968 when plaintiff admitted to engaging in relations with other servicemen. Plaintiff was candid with the Army about his homosexuality; that factor is central to this case.

Clearly the decision to enter or reenlist a soldier is not a casual decision. *See, e.g.*, AR 601-210, ¶ 1-6*a*; AR 601-280, ¶ 1-7. An applicant must be processed to "ensure" that he or she meets the requirements. *Id.* ¶ 2-2. Likewise, the decision of an administrative board of officers, convened specially to determine whether a particular soldier should

be separated due to homosexuality, is a well-considered decision. And granting a servicemember a position in the Nuclear Surety Program, which requires a "Secret" security clearance and a background investigation check, is again a serious decision by the military.

On each of many occasions the Army told plaintiff his homosexuality was *not* disqualifying. This is the essence of plaintiff's estoppel claim. Plaintiff had a right to think he could make the Army his career because the Army told him so. Were the court unwilling to recognize the legitimacy of plaintiff's expectation of continued military service, a "profound, unconscionable injury" to plaintiff would surely result. *See United States v. Lazy FC Ranch*, 481 F.2d at 988.

Taken individually, as stated before, the Army's acts generated enforceable expectations on plaintiff's part. Taken together, over a career spanning more than 14 years, those acts amounted almost to a policy of ignoring this servicemember's homosexuality. As a matter of law, the court concludes that the second element of plaintiff's estoppel claim has been satisfied.

3. *Was Plaintiff Ignorant of the "True Facts"?*

The "true fact" here is that homosexuality is a nonwaivable disqualification for reenlistment to which Headquarters, Department of the Army, cannot grant exceptions. *See* AR 601-280, ¶¶ 1-2*b*, 2-24*c*. Nothing in the record suggests that plaintiff knew homosexuality was a nonwaivable disqualification for reenlistment. But even if plaintiff knew that it was, there is nothing to indicate that he knew no exceptions could be granted. Plaintiff's experience was clearly otherwise. Any doubts plaintiff may have had as to whether the Army would permit him to reenlist were dispelled in 1970, when the Army "corrected" his reenlistment code and signed a three year contract with him. Had

plaintiff known the true facts, it is highly unlikely that he would have invested twelve additional years in the Army. The court is satisfied that plaintiff was ignorant of the current position of the Army.

4. *Did Plaintiff Rely to His Injury on the Army's Conduct Concerning His Homosexuality?*

Tied up in litigation, less than six years from retirement, having invested a total of more than 14 years in the Army, it is not difficult to see that plaintiff has relied to his injury on the many "green lights" he received from Army representatives. Plaintiff developed skills necessary for military employment and refrained from developing skills suitable for civilian jobs. He worked more than 14 years toward a retirement benefits that he could have sought elsewhere. Had the Army refused plaintiff reenlistment in the past, plaintiff would not have lost the opportunities for civilian employment that would have brought him to a point of equivalent achievement.

The injury to plaintiff from having relied on the Army's approval of his military career—and being denied it now—is the loss of his career. The harm to the public interest if reenlistment is not prevented is nonexistent. Plaintiff has demonstrated that he is an excellent soldier. His contribution to this Nation's security is of obviously benefit to the public. Furthermore, when the government deals "carefully, honestly and fairly with its citizens," *United States v. Wharton*, 514 F.2d at 414 (footnote omitted), the public interest is likewise benefited.

ORDER

1. Defendants are estopped from relying on AR 601-280, ¶ 24*c* as a bar to plaintiff's reenlistment. Defendants must process plaintiff's request for reenlistment as if that regulation did not exist.

2. The court declines to order briefing on the propriety of the revocation of plaintiff's security clearance. Plaintiff's appeal from that revocation is still pending before the Assistant Chief of Staff for Intelligence. Judical review of the matter would therefore be inappropriate at this time.

3. The court retains jurisdiction over the instant parties and dispute pending final disposition of plaintiff's request for reenlistment. Counsel are directed to keep the court informed in this regard.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Memorandum and Order to counsel of record.

DATED at Seattle, Washington this 5th day of October, 1982.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C81-1065R

SERGEANT PERRY WATKINS, PLAINTIFF

v.

UNITED STATES ARMY, ET AL., DEFENDANTS

[Filed May 18, 1982]

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the parties' cross motions for summary judgment. These motions incorporate the arguments made in support of and in opposition to defendants' earlier motion to dismiss. The history of the litigation is as follows.

On October 13, 1981 plaintiff filed an amended complaint seeking a temporary restraining order and preliminary and permanent injunctions prohibiting defendants from discharging plaintiff from the United States Army on grounds of homosexuality. At a hearing on plaintiff's application for the temporary restraining order on October 23, plaintiff asked the court to enjoin an Army administrative discharge board, scheduled to convene on October 28, from considering plaintiff for discharge. The

court declined to enter a restraining order, but retained jurisdiction over plaintiff's request for preliminary injunctive relief and directed the parties to inform the court before any action adverse to plaintiff was taken pursuant to a recommendation that the discharge board might make.

The three member board convened at Fort Lewis, Washington on October 28. After hearing testimony and the arguments of counsel, on October 29 a two member majority found that plaintiff was "undesirable for further retention in the military service because he has stated that he is homosexual," and recommended that plaintiff be issued an honorable discharge certificate. Transcript of Proceedings (Tr.) at 429. The dissenting member concluded that plaintiff had not been proved to be a homosexual as defined by Army regulations and recommended that plaintiff not be discharged. *Id.*

Major General Robert M. Elton, commander of the 9th Infantry Division of the United States Army and the discharge authority for the administrative proceeding, requested an exception to the application of Army Regulation (AR) 635-200, ¶ 1-19*b* from Headquarters, Department of the Army (HQDA). Defendants' Memorandum at 7. Plaintiff submitted a rebuttal letter. Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. After HQDA granted the requested exception, MG Elton approved the finding and recommendation of the majority and made the following additional finding:

> I also find, based upon a preponderance of the evidence properly before the board, that SSG Perry J. Watkins has engaged in homosexual acts with other soldiers.

Report of Proceedings at 3. MG Elton directed plaintiff's discharge to occur on April 19, 1982. On April 12 this court, having retained jurisdiction over plaintiff's motion for injunctive relief, entered a preliminary injunction staying

plaintiff's discharge from the Army until the court could rule on the instant motions for summary judgment. On May 7, 1982 defendants filed a notice of appeal from the court's injunction. Before proceeding further with a discussion of the instant motions, the court must indicate that an appeal from a preliminary injunction does not divest the trial court of jurisdiction to proceed with the action on the merits. *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906); *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956); *Thomas v. Board of Education*, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); 9 Moore's Federal Practice ¶ 203.11, at 3-54 & n.42 (2d ed. 1980).

The facts of the case are not in dispute. On August 27, 1967 plaintiff reported to an Army facility for his preinduction physical examination. On a Report of Medical History plaintiff checked the box "YES" indicating that he then had homosexual tendencies or had experienced homosexual tendencies in the past. Tr. at Inclosure 7. A psychiatrist evaluated plaintiff and found him "qualified for admission." *Id.* Following induction and training, plaintiff served in the United States and Korea as a chaplain's assistant, personnel specialist, and company clerk. Defendants' Memorandum at 3. While at Fort Belvori, Virginia in November 1968, plaintiff stated to an Army Criminal Investigation Division agent that he had been a homosexual since the age of 13 and had engaged in homosexual relations with two servicemen. Tr. at Inclosure 9. The investigation of plaintiff for committing sodomy, a criminal offense under Article 125 of the Uniform Code of Military Justice, was dropped because of insufficient evidence. Tr. at Inclosure 10, at 2. Plaintiff received an honorable discharge from the Army on May 8, 1970 at the conclusion of his tour of duty. Official Military Personnel File at 47. His reenlistment eligibility code was listed as "unknown." *Id.*

In May 1971 plaintiff requested correction of the reenlistment designation in his reenlistment code had been corrected to category 1, "eligible for reentry on active duty." *Id.* at 48. On June 18 plaintiff reenlisted for a period of three years. *Id.* at 56. During the fall of 1971, with the permission of the acting commanding officer of his unit, plaintiff performed an entertainment act as a female impersonator before the troops at a celebration of Organization Day for the 56th Brigade. Amended Complaint ¶ 19. Plaintiffs' performance was reported in the December 1, 1971 issue of *Army Times*, a publication distributed to Army personnel worldwide. *Id.* ¶ 20. In the spring of 1972, plaintiff performed as a female impersonator at the Volks Festival in Berlin, West Germany, with the express permission of his commanding officer. *Id.* ¶ 22. In January 1972, plaintiff was denied a security clearance based on his November 1968 statement concerning his homosexuality. Military Intelligence File at 22.

On March 21, 1974 plaintiff reenlisted for six years and was subsequently reassigned to South Korea as a company clerk. Official Military Personnel File at 65. In October 1975, plaintiff's commander initiated elimination proceedings against plaintiff for unsuitability due to homosexuality pursuant to AR 635-200, Chapter 13.[1] On October 14, 1975 a four member board convened at Camp Mercer, South Korea and heard testimony indicating that plaintiff was a homosexual and the arguments of counsel. Military Intelligence File at 84. Captain Albert J. Bast III testified that as plaintiff's commander he had discovered, through a background record check, that plaintiff had a history of homosexual tendencies. When Bast asked plaintiff about

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[1] Chapter 13 of AR 635-200 has been superseded by the present regulation concerning separations by reason of homosexuality, AR 635-200, Chapter 15 (effective September 1, 1981).

it, plaintiff stated that he was a homosexual. *Id.* at 85. Bast testified further that plaintiff was "the best clerk I have known," and that plaintiff homosexuality did not affect the company. *Id.* First Sergeant Owen Johnson testified that everyone in the company knew that plaintiff was a homosexual and that plaintiff's homosexuality had not caused any problems or elicited any complaints. *Id.* at 86. The board made the following unanimious finding: "SP5 Perry J. Watkins is suitable for retention in the military service." *Id.* at 87. The board's recommendation was that plaintiff "be retained in the military service," and that plaintiff was "suited for duty in administrative positions and progression through Specialist rating." *Id.* The convening authority apparently agreed with the board's finding and recommendations.

Following an assignment in the United States as a unit clerk, plaintiff was reassigned to Germany, where he served as clerk and a personnel specialist with the 5th United States Army Artillery Group. In November 1977 the commander of the 5th USAAG granted plaintiff a security clearance for information classified as "Secret." *Id.* at 14. Thereafter plaintiff applied for a position in the Nuclear Surety Personnel Reliability Program, to qualify for which an applicant must have a security clearance for information classified as "Secret" and must pass a background investigation check., Amended Complaint ¶ 28. Plaintiff was initially informed that, because his medical records showed he had homosexual tendencies, he was ineligible for a position in the program. Defendants' Memorandum at 5 n.1; Amended Complaint ¶ 29. Plaintiff appealed. *Id.* ¶ 30. In support of his appeal plaintiff's commanding officer, Captain Dale E. Pastian, requested that plaintiff be requalified because plaintiff had been medically cleared, because of plaintiff's "outstanding professional attitude, integrity, and suitability for assignment" in the program, and because the 1975

Chapter 13 board recommended that plaintiff be retained and be allowed to progress in the military. Military Intelligence File at 68. Examining physicial Lieutenant Colonel J.C. De Tata, M.D., concluded that plaintiff's homosexuality appeared to cause no problems in his work and noted that plaintiff had been through a Chapter 13 board "with positive results." *Id.* at 70. The decision to deny plaintiff's eligibility for the Nuclear Surety Program was reversed and plaintiff was accepted into the program in July 1978. *Id.* at 64.

Following an investigation by military intelligence in the spring of 1979, the commander of the U.S. Army Personnel Clearance Facility by letter dated December 18, 1979 notified plaintiff of the Army's intent to revoke his security clearance. *Id.* at 12. The letter stated that revocation was being sought "because during an interview on 15 March 1979, you stated that you have been a homosexual for the past 15 to 20 years." *Id.* Plaintiff submitted a rebuttal letter on May 29, 1980 admitting making that statement. *Id.* at 8. The commanding officer of the Central Security Facility revoked plaintiff's security clearance by letter dated July 10, 1980. *Id.* at 6.

In February 1981 plaintiff appealed the revocation to the Office of the Assistant Chief of Staff for Intelligence. Amended Complaint, Exhibit J-2. Upon discovering in May that his appeal letter had apparently been misplaced or lost, plaintiff sent a second copy of the February letter to Ronald W. Morgan of the Office of the Assistant Chief of Staff for Intelligence. *Id.* ¶ 35. That officer referred the matter to the Army's Deputy Chief of Staff for Personnel for a determination whether the newly promulgated Chapter 15 of AR 635-200 required or permitted plaintiff's discharge. Defendants' Memorandum at 6. The Assistant Chief of Staff's Office stayed action on plaintiff's appeal pending the determination whether proceedings under Chapter 15

would be commenced. Declaration of Ronald W. Morgan, filed April 12, 1982. Plaintiff brought this action on August 31, 1981 challenging the revocation of this security clearance because he had admitted to being a homosexual and seeking to prevent his discharge from the Army for honosexuality.

After receiving an opinion from the Judge Advocate General (JAG) of the Army that AR 635-200, ¶ 1-19*b*, the Army's regulatory "double jeopardy" provision, did not preclude plaintiff's discharge for homosexuality, the Deputy Chief of Staff's Office referred the matter to plaintiff's commander for appropriate action under Chapter 15. Defendant's Memorandum at 6; *see* Tr. at Inclosure 4. Plaintiff received notice of his commander's decision to hold a Chapter 15 discharge proceeding by letter dated September 17, 1981. Tr. at Inclosure 3. Plaintiff amended his complaint on October 12 and sought a temporary restraining order enjoining the Army from convening an administrative discharge board. As stated earlier, the court declined to enter a temporary restraining order, the board recommended that plaintiff be given an honorable discharge, and MG Elton approved that recommendation.

Plaintiff's amended complaint alleges that the revocation of his security clearance violates substantive and procedural due process requirements, the First Amendment, principles of equal protection, and is based on an unconstitutionally vague provision. Plaintiff further alleges that discharging him under AR 635-200, Chapter 15 is unconstitutional because Chapter 12 is void on its face and as applied to plaintiff, and because due process, privacy, First Amendment and estoppel principles prevent it. Plaintiff prays for a permanent injunction barring defendants from discharging plaintiff from the Army on grounds of homosexuality, and requiring defendants to reinstate plaintiff's security clearance and not revoke it in the future based on plain-

tiff's homosexuality. Plaintiff also requests a declaratory judgment that AR 635-200, Chapter 15 is unconstitutional on its face. Finally, plaintiff asks that the court enter an injunction prohibiting defendants from ever failing to promote or decorate, or from taking any action to retard or hinder plaintiff's Army career because of his homosexuality.

I. Exhaustion of Administrative Remedies

The first question is whether exhaustion before the Army Board for Correction of Military Records (ABCMR) is required. The ABCMR is established pursuant to 10 U.S.C. § 1552 and 32 C.F.R. § 581.3 and is given the function of reviewing applications properly before it "for the purpose of determining the existence of an error or an injustice." 32 C.F.R. § 581.3(b)(2). The board may "correct any military record . . . to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Unlike the Army Discharge Review Board, established pursuant to 10 U.S.C. § 1553 and 32. C..F.R. § 581.2, which reviews only the *type* of discharge given a servicemember, the ABCMR may review the *fact* of discharge. *Hodge v. Callaway*, 499 F.2d 417, 421 (5th Cir. 1974).

The specific question whether a servicemember challenging an Army discharge decision must exhaust to the ABCMR was considered in *Montgomery v. Rumsfeld*, 572 F.2d 250 (9th Cir. 1978). There, plaintiffs were trying to be released from the Army on the grounds that promises made to them when they enlisted were not kept. The district court dismissed because plaintiffs had not sought review before the ABCMR. The court of appeals reversed, holding that appeal to the ABCMR is not a statutorily mandated prerequisite to federal court jurisdiction, and remanded so the district court could weigh the appropriate factors to determine whether exhaustion was required. Those factors

are "[1] the need for an administrative record for proper judicial review, [2] the agency's interests in applying its expertise, in correcting its own errors, and preserving the efficacy and independence of its administrative system, and [3] particularly, the district court should carefully consider 'whether allowing all similarly situated [individuals] to bypass [the administrative avenue in question] would seriously impair the [agency's] ability to perform its functions.' " *Id.* at 254 (citations omitted).

Here, the first and third of those factors are easily dealt with. An administrative record adequate for judicial review already exists: the Chapter 15 proceeding was transcribed and all documentary evidence before the board was made a part of the record, and plaintiff's military personnel and military intelligence files have been submitted to the court. And certainly there are few, if any, persons situated similarly to plaintiff, so the Army's ability to perform its military function would not in any way be impaired by not requiring exhaustion.

The second factor, when analyzed closely, also indicates that judicial review at this time would be appropriate. The question whether plaintiff's discharge is permissible is exclusively a question of law; there is no dispute as to material facts. Yet the ABCMR has no expertise in matters of law:

> The boards rarely determine legal questions themselves. Instead each board relies almost exclusively on the opinions of its service's Office of the Judge Advocate General.[261]

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[261] The Army BCMR relies on opinions of the Office of the Judge advocate General of the Army or the General Counsel of the Army. Letter from Executive Secretary, Army Board for the Correction of Military Records, March 3, 1971. . . .

Lunding, *Judicial Review of Military Administrative Discharges,* 83 Yale L.J. 33, 70 & n.261 (1973); *see* 32

C.F.R. § 581.3(h)(1)(ii) (ABCMR authorized to call upon department of Army for assistance within area of that department's jurisdiction). Here, of course, the Judge Advocate General advised the Deputy Chief of Staff for Personnel that there was no legal barrier to processing plaintiff for discharge under Chapter 15. Defendants' Memorandum at 6. An appeal to the ABCMR challenging the legality of processing plaintiff for discharge would therefore be futile, because the board and the Secretary would rely on the very legal opinion being challenged. This was precisely the reasoning in *Beaty v. Kenan*, 420 F.2d 55, 59 (9th Cir. 1969), where the court held exhaustion before the ABCMR unnecessary.

For the same reason, the Army's interest in correcting its own errors would not be furthered by requiring exhaustion to the ABCMR. Finally, the court is of the opinion that the efficacy and independence of the military administrative system has been sufficiently preserved and protected by the court's encouraging exhaustion before the Chapter 15 board and declining to act affirmatively until now.

II. Reviewability of Military Decision

Having determined that exhaustion before the ABCMR is unnecessary, the court must still determine whether the Army's decision to discharge plaintiff is reviewable under the standards of *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981). Plaintiff here alleges a violation of the Constitution and military regulations and he has exhausted effective intraservice remedies. The court must now weigh: (1) the nature and strength of plaintiff's claim; (2) the potential injury to plaintiff if review is refused; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved. *Id.* at 732-33. For the reasons given below, the court is of the

opinion that plaintff's claim that his discharge is invalid is not only strong, but requires that partial summary judgment be entered in his favor. If review is refused, plaintiff will lose his career in the military and his 14 year investment toward retirement benefits. The court's action will necessarily cause some interference with military functions; that alone cannot preclude review. *See id.* at 733. here, the military function of defending this country will not be disturbed by the court's reviewing plaintiff's claims, but some interference with the military function of regulating its own personnel will occur. According to the defendants, the decision to discharge did not involve discretion. Declaration of Major General Robert M. Elton, dated April 9, 1982. And deciding plaintiff's legal claims does not require military expertise. On the contrary, it requires an expertise that the ABCMR, a civilian board of nonlawyers, lacks. *See* 32 C.F.R. § 581.3(b)(ii). On balance, then, the court concluded that the degree of intrusion into military affairs occasioned by the court's review of plaintiff's claim is more than outweighed by the strength of plaintiff's claim, the risk of harm to him if review is refused, and the expertise of the court as opposed to the ABCMR.

III. Validity of Plaintiff's Discharge

Having determined that plaintiff's claims are presently reviewable, the court turns to the question whether the decision to discharge plaintiff was proper. The military decision must be affirmed unless it was arbitrary or capricious, unsupported by substantial evidence, or contrary to law. *Sanford v. United States*, 399 F.2d 693, 694 (9th cir. 1968) (per curiam); *Hodges v. Callaway, supra,* 499 F.2d at 423; *Peppers v. United States Army*, 479 F.2d 79, 83-83 (4th Cir. 1973); *Doe v. Chaffee*. 355 F. Supp. 112, 114 (N.D. Cal. 1973); *see also* 5 U.S.C. § 706(2)(C), (D).

It is well settled that the Army must abide by its own regulations. *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (per curiam); *Grimm v. Brown*, 449 F.2d 654 (9th Cir. 1971); *Van Bourg v. Nitze*, 388 F.2d 558 (D.C. Cir. 1967). The Army regulation at issue in this case provides in pertinent part as follows:

> *b.* Separation pursuant to this regulation should not be based on conduct which has already been considered at a prior administrative or judicial proceeding and disposed of in a manner indicating that separation is not warranted. Accordingly, administrative separations under the provisions of chapter 13, 14 and 15 of this regulation and AR 604-10 are subject to the following restrictions and no member will be considered for administrative separation because of conduct which—
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> . . . .
>
> (2) Has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service.
>
> . . . .
>
> *c.* The restrictions in *b* above are not applicable when—
>
> (1) *Substantial new evidence,* fraud, or collusion is discovered, which was not known at the time of the original proceeding, despite the exercise of due diligence, and which will probably produce a result significantly less favorable for the soldier at a new hearing.
>
> (2) *Subsequent conduct* by the soldier warrants consideration for separation. Such conduct need not independently justify the soldier's discharge, but must be sufficiently serious to raise a question as to his potential for further useful military service. This exception, however, does not permit further consideration of con-

duct of which the soldier has been absolved in a prior final factual determination by an administrative or judicial body.

(3) An *express exception* has been granted by HQDA pursuant to a request by a convening authority through channels that, due to the unusual circumstances of the case, administrative separation should be accomplished. Prior to forwarding the case, however, the member will be advised of the convening authority's intentions in this regard, given the opportunity to review the proposed forwarding correspondence, and be permitted to present written matters in rebuttal thereto if desired.

AR 635-200, ¶ 1-19*b* & *c* (September 1, 1981) (emphasis added).

As stated earlier, in October 1975 a four member administrative board, convened to consider whether plaintiff should be discharged under the predecessor regulation to Chapter 15, unanimously recommended that plaintiff "be retained in the military service" and be eligible for promotion. The board's determination apparently was adopted by the discharge authority and became final. Defendants' Memorandum at 6.

At the close of the Army's case at Fort Lewis last October, the Legal Advisor heard argument on the applicability of ¶ 1-19*b*.[2] He ruled that ¶ 1-19*b* was inapplicable for two reasons. Under ¶ 1-19*c* (2), he found that there was proof of subsequent conduct on the part of plaintiff which the board was entitled to consider. Tr. at 228-29. That conduct

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[2] The Legal Advisor had already ruled that the restriction imposed by ¶ 1-19*b* could not be avoided by reliance on ¶ 1-19*c*(1). Tr. at 93. That ruling was apparently acquiesced in by Captain James W. Larson, the Army's representative at the proceeding. The Legal Advisor's ruling as to ¶ 1-19*c*(1) has not been challenged in this court.

evidently could include, or be limited to, plaintiff's March 15, 1979 statement to a military intelligence agent that he was a homosexual, as is reflected by the Advisor's instructions to the board. Tr. at 417-18. Second, the Advisor found that Inclusure 4 to the Transcript of Proceedings, consisting of a letter from HQDA, was an express exemption to the applicability of ¶ 1-19*b*. Plaintiff excepted to the ruling.

The court is constrained to hold that the Advisor's ruling was arbitrary, unsupported by substantial evidence, and contrary to law. "Subsequent conduct" evidence consisted of testimony relating to two incidents. Specialist Fourth Class Andrew K. Snook testified to being picked up while hitchhiking on or about July 4, 1980 by a black staff sergeant in a silver or gray car with light colored license plates. Snook testified that the sergeant squeezed his leg in a homosexual advance. Snook was unable to identify plaintiff in a line-up conducted on October 28, 1981 at Fort Lewis. Captain Huge M. Bryan, who was the unit commander at Fort Lewis in 1980 when the alleged incident took place, testified that after talking with Snook he believed that the staff sergeant who had given Snook a ride was plaintiff. Plaintiff later testified to owning a silver car with light colored license plates. On cross examination, Captain Bryan admitted that there were probably thousands of black staff sergeants at Fort Lewis, and that probably a couple of hundreds of them had light colored cars.

The other alleged incident was testified to by PFC David P. Valley. Valley testified that plaintiff asked him if he'd like to move into plaintiff's apartment with him, and that plaintiff used to come by the mailroom and stare at Valley. Plaintiff denied both allegations. On cross examination, Valley indicated that he was not sure that plaintiff had been making an advance toward him. In addition, Valley admitted to being prejudiced against black people and against homosexuals, having once had a bad experience with a

homosexual, and related that he had been disciplined once by a board of which plaintiff was a member. The rest of the evidence presented by the Army was relevant only to the quality of plaintiff's performance and the character of the discharge plaintiff would receive.

The board rejected the evidence that plaintiff had engaged in homosexual acts with Snook and Valley. It returned the single finding that plaintiff had states he was a homosexual, and, following the Advisor's instructions, made the recommendation that plaintiff be discharged. Plaintiff's candid admission in 1967 that he had homosexual tendencies undoubtedly would have been a proper basis for denying him eligibility for service duty or entitlement. *See Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). Plaintiff's restatement of that facts subsequent to 1975, however, standing alone, cannot justify his discharge. No member can be separated "because of conduct which . . . has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service." AR 635-200, ¶ 1-19*b*(2).[3] The 1975 Chapter 13 board had before it evidence that plaintiff admitted he was a homosexual. The regulation in effect at that time provided for separation of members who had homosexual tendencies whether or not homosexual acts had been committed. AR 635-200, ¶ 13-5(b)(5) (effective Novembe 23, 1972). The 1975 proceedings resulted in a final determination that plaintiff should be retained in the Army. Accordingly, plaintiff cannot be separated because he has admitted that he is a homosexual.

The fact that he has repeated his admission subsequent to 1975 does not change his result. Plaintiff's admissions

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[3] The Army treated plaintiff's admissions as "conduct" at the Chapter 15 proceeding, Tr. at 217, and as the equivalent of conduct before his court, Defendant's Reply Memorandum at 6 n.2.

appear to have been made, in every instance, in response to questioning by a superior officer. Aside from the unfairness of penalizing plaintiff for his honesty in responding to official questioning, plaintiff's reiteration of a fact which the 1975 Chapter 13 board found did not require his separation cannot be considered "subsequent conduct" under ¶ 1-19*c*(2). That *fact* was the subject of the prior administrative proceeding.

The Legal Advisor was also in error in ruling that the letter from HQDA, Inclosure 4 to the Transcript of Proceedings, was an "express exception" to the double jeopardy bar of ¶ 1-19*b*(2). *See* Tr. at 231. Inclosure 4 does not even purport to be an express exception under ¶ 1-19*c*(3), nor were the procedural requirements of that paragraph followed with respect to Inclosure 4. Were Inclosure 4 such an exception, MG Elton would have had no need to petition HQDA for an exception ruling after he received the board's recommendation.

Defendants argue, however, that the express exception obtained by MG Elton sometime after December 23, 1981 permits plaintiff's discharge. The court cannot agree. The administrative discharge board concluded on October 29, 1981 that plaintiff should be discharge because he had stated he was a homosexual. Yet the regulation only permits separation under Chapter 15 when an exception "has been granted . . . *[p]rior to forwarding the case* . . ." AR 635-200, ¶ 1-19*c*(3) (emphasis added). The exemption obtained by MG Elton sometime after December was not a prior express exemption as is contemplated by the regulation. In *Cuadra v. Resor*, 437 F.2d 1211 (9th Cir. 1970) (per curiam), the Army's failure to follow its own regulation, which required it to obtain Selective Service advice *before* acting on an application for a hardship discharge, required vacation of the district court's judgment for the Army. The Army had denied plaintiff's application for discharge, then, after plain-

tiff sued, had sought Selective Service advice. Similarly, in the case at bar, the Army convened the discharge board which recommended discharge, then, *after* plaintiff raised the bar of ¶ 1-19*b* at the proceeding, obtained the exemption allowing it to accomplish separation. Defendant's Memorandum at 7.

Even if retroactive application were sufficient under ¶ 1-19*c*(3), however, the determination by HQDA that an express exception was proper was arbitrary. The Adjutant General's letter requesting the express exception argues that ¶ 1-19*b*(2) does not make "any allowance for eliminations based upon a change in policy." *See* Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. It then requests that an exception be granted because the new policy expressed in Chapter 15 is an "unusual circumstance." The Flaw in the Adjutant General's argument, and HQDA's action thereon, is apparent. Paragraph 1-19*b* itself states: "[A]dministrative separations under the provisions of chapter 13, 14 and 15 of this regulation . . . are subject to the [double jeopardy] restrictions. . . ." Hence HQDA's determination that the new policy expressed in Chapter 15 was an "unusual circumstances" that warranted denying plaintiff the protection of ¶ 1-19*b*(2) was contrary to ¶ 1-19*b* itself.

The court's determination that the instant discharge of plaintiff is void because it cannot be predicated on his statements that he is a homosexual is bolstered by evidence that the Army previously declined to process plaintiff under Chapter 15 because of the double jeopardy bar. Major Palmer Penny, 9th Aviation Battalion, testified at the Chapter 15 proceedings that in the summer of 1980 he had looked into holding a Chapter 13 proceeding. Penny stated that he had contacted members of the Adjutant General's office to ascertain whether a Chapter 13 proceeding was possible. Tr. at 69. According to Penny, "the AG folks"

had told him that a Chapter 13 was not permissible because plaintiff had already been cleared by a prior Chapter 13 board. *Id.* at 70, 73 ("[A]ll avenues were closed unless Sergeant Watkins . . . approached someone. . . ." *Id.* at 72.). Then, after Private Snook complained about the hitchhiking incident, Penny again sought advice from the Adjutant General's office. Penny testified that the Adjutant General's office adivised him that the Snook incident did not constitute substantial evidence against plaintiff. *Id.* at 74-75. The matter was therefore dropped. *Id.*

Nor does MG Elton's supplemental finding of acts render the double jeopardy bar inapplicable. The regulation states that, if the administrative board recommends discharge, the discharge authority shall "(1) Approve the finding and direct separation; or (2) Disapprove the finding. . . ." AR 635-200, ¶ 15-11*b*; *accord*, 32 C.F.R. § 41.13(e)(4)(ii)(B). The option to make additional findings is not available.[4]

In light of all the foregoing, noting in particular the basic unfairness of discharging plaintiff because he repeated after 1975 the same statement he made at every critical juncture during his Army career, the court rules that plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Defendants may not discharge plaintiff because he has stated in the past or will state in the future that he is a homosexual. The court express no opinion whether plaintiff can validly be discharged in the event the Army proves

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[4] The court does not agree with defendants that AR 15-6, ¶ 2-3*a* allowed MG Elton to make an additional finding. To the extent it is inconsistent with AR 635-200, AR 15-6 does not apply to discharges under AR 635-200. *See* AR 635-200, ¶ 1-23*e*. The particulariized requirements of ¶ 15-11*b* quoted in the text are inconsistent with ¶ 12-3*a* of AR 15-6. MG Elton was therefore limited by the provisions of Chapter 15, AR 635-200.

the commission of homosexual acts by plaintiff that have not been the subject of administrative proceedings.

2. No determination concerning the correctness of the Army's decision to revoke plaintiff's security clearance will be made at this time. Insofar as plaintiff has an appeal pending before the Assistant Chief of Staff for Intelligence the issue is not ripe.

3. Further briefing is necessary on the issue whether deffendants should be enjoined, under principles of estoppel and under military regulations, from denying plaintiff reenlistment when his current tour of duty expires in October 1982. The court retains jurisdiction over plaintiff's claim that such denial is prohibited and Orders the parties to submit briefs on the issue in accordance with the following schedule:

Plaintiff's brief is due June 11;
Defendants' response is due June 25;
Plaintiff's reply, if any, is due July 2.

4. Because of the court's resolution of the issues of plaintiff's discharge and the revocation of plaintiff's security clearance, the court finds it unnecessary to render a declaratory judgment that AR 635-200, Chapter 15 is unconstitutional.

5. The court further Orders that plaintiffs' statuts shall not be diminished by defendants as a result of this lawsuit; this includes, but is not limited to, plaintiff's right to attend Army training programs.

Defendants' motion for summary judgment is DENIED.

The Clerk of the Court is directed to send uncertified copies of this Order to counsel of record.

DATED at Seattle, Washington this 18th day of May, 1982.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4006

SERGEANT PERRY WATKINS, PLAINTIFF-APPELLANT

v.

UNITED STATES ARMY, ET AL., DEFENDANTS-APPELLEES

[Filed Jan. 19, 1990]

ORDER

Before: Goodwin, Chief Judge, Schroeder, Pregerson, Alacon, Nelson, Canby, Norris, Beezer, Hall, O'Scannlain, and Trott, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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